82-1704

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LARRY BENNETT, JR., JOHN E. VICKERS, DR. MARION CARROLL, DR. THOMAS F. STATON, J. LOUIS WILKINSON, W. S. HAMNER, JOE OLIVER, JOE RAINES, and JUDSON C. LOCKE, JR.,

Petitioners,

v.

BOBBY WILLIAMS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the defense of qualified immunity is unavailable as a matter of law to officials and employees of a state prison system previously found by a federal court to be unconstitutional until court-mandated broad scale standards have been fully implemented.

II. Whether the Court of Appeals erred in directing the trial court to permit the use of offensive collateral estoppel where conditions and facts addressed in the previous case were not proven to be in existence at the time of the incident in question, and the defendants were either not parties to, were unaware of, or did not have an opportunity to attack the previous findings.

III. Whether the trial court abused its discretion in instructing the jury that the state itself is not a party and cannot be held liable for damages when the given charge correctly stated the law and the instruction was precipitated by improper argument made by plaintiff's attorney during closing argument.

PARTIES

The parties to the appeal of this case before the Eleventh Circuit Court of Appeals were Larry Bennett, Jr., John E. Vickers, Dr. Marion Carroll, Dr. Thomas F. Staton, J. Louis Wilkinson, W.S. Hamner, Joe Oliver, John Chancery, Joe Raines, Larry Cook, Judson C. Locke, Jr., and State of Alabama Board of Corrections, Appellees, and Bobby Williams, Appellant.

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LARRY BENNETT, JR., JOHN E. VICKERS, DR. MARION CARROLL, DR. THOMAS F. STATON, J. LOUIS WILKINSON, W. S. HAMNER, JOE OLIVER, JOE RAINES, and JUDSON C. LOCKE, JR.,

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Petitioners Larry Bennett, Jr., John E. Vickers, Dr. Marion Carroll, Dr. Thomas F. Staton, J. Louis Wilkinson, W.S. Hamner, Joe Oliver, Joe Raines, and Judson C. Locke, Jr., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding October 29, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Williams v. Bennett* at 689 F.2d 1370 (11th Cir. 1982), and a copy of said opinion appears in the Appendix hereto as Appendix A. No opinion was rendered by the United States District Court for the Middle District of Alabama.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on October 29, 1982. (Appendix B.) A timely petition for rehearing was filed and was denied on December 20, 1982, (Appendix C), however, due to a clerical error, defendants' counsel was not served with a copy of that order. The Court of Appeals for the Eleventh Circuit issued its mandate on January 14, 1983, but on motion of counsel on February 16, 1983, recalled and stayed the mandate to and including April 8, 1983. Pursuant to an application for extension of time filed by counsel for Petitioners herein, the United States Supreme Court granted an extension of time for filing the Petition for Writ of Certiorari until and including April 19, 1983, and this Petition is being filed within that time period.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Constitution of the United States, Amendment XI:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Constitution of the United States, Amendment XIV, § 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Code, Title 42:

§ 1983. *Civil action for deprivation of rights.*

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Code of Alabama 1975, § 41-9-74

"Board to pay judgments against board of corrections officials; limitations, exceptions, etc.

(a) As part of the consideration of the employment or appointment of the commissioner of the board of corrections, deputy commissioners of the board of corrections, members of the board of corrections and other officers, employees and agents of the board of corrections, whether part-time or full-time, the board of adjustment shall pay all final judgments awarded in courts of competent jurisdiction against the aforesaid commissioner, deputy commissioners, members of the board of corrections, officers, employees and agents, for acts arising out of and performed in connection with their official duties in behalf of the state of Alabama, except to the extent that such coverage may be provided by an insurance carrier.

(b) Payment shall be limited to a maximum of $100,000.00 for all claims arising out of the same act.

(c) No part of this section shall be admissible evidence in any court of law wherein any of the officers or persons indemnified herein are parties. Nothing in this section shall be deemed to waive the sovereign immunity of the state with respect to a claim covered under this section or to authorize the payment by the state of any judgment or settlement against the aforesaid commissioner, deputy commissioners, members of the board of corrections, officers, employees and agents, to the extent that the same exceeds the sum of $100,000.00.

(d) The provisions of this section shall not apply to the commissioner, any deputy commissioner, any member of the board of corrections and any other officer, employee and agent of the board of corrections who is

found guilty of gross negligence or intentional or knowingly unlawful behavior."

STATEMENT OF THE CASE

This suit arose from an incident between two inmates incarcerated in the population section of Holman Prison, Atmore, Alabama, on January 10, 1978. Prior to the date of this incident the United States District Court for the Middle District of Alabama had ordered broad prison reforms throughout the Alabama Prison System. *Pugh v. Locke*, 406 F.Supp. 318 (M.D.Ala. 1976) (Appendix H), *aff'd with modifications sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977) (Appendix G), *rev'd in part sub nom. Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 56 L.Ed.2d 1114 (1978) (Appendix F). *Pugh*, *id.*, mandated that certain standards be met within the prison system to eliminate the deprivation of constitutional rights of the inmates it found to exist. It did not, however, require or expect immediate compliance and established procedures to stay abreast of the progress being made toward compliance.

Subsequent to the incident which was the basis of this litigation in the lower court, on the motion of the Governor of Alabama, Fob James, the Board of Corrections was disbanded and the prison system was placed in receivership, with Governor James named as receiver. (Opinion and Order establishing receiver is attached hereto as Appendix I.) Suit was brought pursuant to 42 U.S.C. §§ 1983, 1985, and 1986, with jurisdiction of the district court invoked under 28 U.S.C. § 1331 and § 1343, against the individual petitioners herein and John Chancery, deceased, in both their individual and official capacities, and against the Alabama Board of Corrections and and Larry Cook. All of the facts material to the consid-

eration of the questions presented herein are stated in the opinion of the Eleventh Circuit in *Williams v. Bennett*, 689 F.2d 1370 (11th Cir. 1982), Appendix A hereto. All of the individuals sued in their official capacities were dismissed in their official capacities prior to the commencement of the trial, as was the Alabama Board of Corrections, and Larry Cook was dismissed during the trial for lack of jurisdiction over the claims alleged against him. Directed verdicts in favor of defendants Joe Raines and John Chancery were granted on December 8, 1980, and on that same date the jury returned a verdict for the remaining defendants. A corresponding judgment was subsequently entered. (Appendix E.)

Plaintiff-Appellant filed his appeal in the Circuit Court of Appeals for the Eleventh Circuit where, after the customary briefing, the case was orally argued. The Circuit Court reversed and remanded the case to the trial court for further proceedings consistent with its opinion. (Appendices A and B.) Although Defendants-Appellees petitioned the Court for a rehearing, the petition was denied on December 20, 1982. (Appendix C.) Because of a clerical error counsel for Defendants-Appellees were not informed of the denial and, indeed, were not aware of it until the Mandate issued on January 14, 1983. Subsequently, Defendants-Appellees moved the Court of Appeals to recall the Mandate and stay its issuance, and the Court did recall the mandate and stay its issuance to and including April 8, 1983. Upon application to the Supreme Court of the United States an extension of time was granted Petitioners for filing their Petition for Writ of Certiorari to and including April 19, 1983.

REASONS FOR GRANTING THE WRIT

This petition seeks review of an unprecedented Court of Appeals decision of major significance which greatly expands the personal liability of government officials and employees who continue to work for state agencies after those agencies have been found by federal courts to be in violation of the Eighth Amendment and ordered to undertake compliance with numerous standards established by those courts. The Court of Appeals held that the time set in a federal court's remedial order for compliance with its standards is immaterial, and, in a § 1983 action against such officials and employees, that the plaintiff need not prove any Eighth Amendment violation or proximate causation but that the trial court *must* direct a finding of cruel and unusual punishment as the proximate cause of the injury. It also held that the defendants in such a case cannot assert a qualified immunity or good faith defense. This shocking result, achieved through a reckless expansion of the use of offensive collateral estoppel, conflicts with prior decisions of this Court and is in conflict with decisions of other Courts of Appeal. Furthermore, this case does not present an isolated problem involving only these defendants, but, if allowed to stand, will adversely affect every other employee of a state prison or mental health system within the Eleventh Circuit which is operating under federal receiverships or federal court remedial orders—even those employees who have never been parties to any prior litigation or may have only recently been employed. It will also have an effect upon the states and their agencies as well, for many employees will be hesitant to remain in their jobs and bear such risks. The Eleventh Circuit's response to this has been to suggest that those officials and employees who do walk away might be guilty of callous indifference toward their charges and,

presumably, personally liable for so doing. Such employees face a situation that is intolerable and one which this Court cannot allow to continue.

I.

OFFENSIVE COLLATERAL ESTOPPEL

In the instant case, the United States Court of Appeals has held that the defendants in the court below were collaterally estopped to litigate the issue of whether a particular condition or practice in Holman Prison violated the plaintiff's Eighth Amendment right to be free from cruel and unusual punishment, because of a 1976 order which found the prison system as a whole to be constitutionally defective and directed that numerous changes be made in it over a period of time, including a change in the particular conditions in *Pugh v. Locke*, 406 F.Supp. 318 (M.D.Ala. 1976), *aff'd with modification sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part sub nom. Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 56 L.Ed.2d 1114 (1978). This holding which directs the trial court to permit the offensive use of collateral estoppel in this instance is in direct conflict with the decision of this Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). That case set forth the general conditions which permit the offensive use of collateral estoppel along with some, although not exhaustive, parameters for that application. In *Parklane Hosiery*, the Supreme Court found that while the *trial* court had wide discretion in permitting the offensive use of collateral estoppel, it should consider not only the possible negative effects on judicial economy related to not permitting its use but also the fairness to defendants in permitting its use thereby foreclosing relitigation of an issue, and it held that the party

against whom collateral estoppel would be offensively applied would have to have had a "full and fair" opportunity to litigate its claims in the prior action.

In order to avoid problems in the doctrine's use, the Supreme Court has been said to have adopted a general rule to guide the lower court:

> The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where . . . the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel. *Parklane Hosiery v. Shore*, 439 U.S. 322, at 331, 99 S.Ct. 645 at 651, 58 L.Ed. 552 (1979).

Chemetron Corp. v. Business Funds, Inc., 682 F.2d 1149 (5th Cir. 1982). Although citing *Parklane*, the Court of Appeals ignored the restrictions placed by this Court on the use of offensive collateral estoppel and even departed from its own prior application of *Parklane* expressed in *Hicks v. Quaker Oats Company*, 662 F.2d 1158 (5th Cir. Unit A 1981). There the same court that so recklessly orders the trial court in this case to permit the offensive use of collateral estoppel in the face of findings by the trial court that its use would be unfair to the defendants, recognized that its use should depend on the *fairness of applying the doctrine in the context of particular fact situations*. 662 F.2d 1158 at 1171. [Emphasis supplied.] See *Parklane*, at 330-331.

The particular fact situation in this case clearly shows the impropriety of the Court of Appeal's decision in reversing the action taken by the trial court. *Pugh* (the case whose judgment is said to estop the relitigation of the issue) and *Williams* are totally different. *Pugh* was a class action seeking injunctive relief related to conditions in the *entire* Alabama penal system, while *Williams* was a

damage suit brought by an individual plaintiff. *Pugh* found that unconstitutional conditions existed in 1976, while *Williams* involved an injury which occurred two years later—after significant court-monitored changes had been made in all phases of prison life. The parties to the cases were not identical. Those defendants in *Williams* who had been parties in *Pugh* were sued in different capacities in each case, and some of the defendants in *Williams*, while generally aware of *Pugh* decision, were not aware of its particular provisions and had had *no* opportunity to defend the *Pugh* case—having not been parties. *Pugh* dealt with prison conditions generally, while the particular condition complained of in *Williams* had not been litigated in *Pugh* but was one of numerous standards established by the trial court's remedial order. The Eleventh Circuit could not have departed more from *Parklane* and its own earlier decisions which established the accepted and prescribed manner in which offensive collateral estoppel may be applied.

The Eleventh Circuit decision also conflicts with the decisions of other Courts of Appeal. The Fifth Circuit in *Chemetron Corp. v. Business Funds, Inc.*, *supra*, decided only weeks before the Eleventh Circuit's decision in *Williams*, emphasized the importance of applying collateral estoppel only when such application was not unfair. However, the Court's application herein does not even pass that initial test of not being unfair and does not begin to approach the generally acceptable standards so eloquently expressed by the Seventh Circuit in *Crowder v. Lash*, 687 F.2d 996 (7th Cir. 1982):

> In order to determine when a party may appropriately be precluded from relitigating an issue decided adversely to it in an earlier proceeding, a court must examine *whether the issue* on which collateral estop-

> pel is asserted *is identical* to that determined in a prior action; whether the controlling facts or legal principles have changed significantly since the prior judgment; and whether any special circumstances exist which would render preclusion inappropriate of unfair. [Citing *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1970). *See also: Hicks v. Quaker Oats Co.*, 662 F.2d 1158 (5th Cir. 1981).]

These elements were carefully considered by the trial court below, but not by the Court of Appeals.

The Court of Appeals for the Second Circuit has noted that the requirements for the application of the doctrine of collateral estoppel include the identicalness of the issue in the subsequent case to that in the prior suit. *Rx Data Corp. v. Department of Social Services*, 684 F.2d 192 (2d Cir. 1982). The Court of Claims in reviewing the use of this doctrine in taxpayer suits has stated that, while the doctrine does have a viable economic benefit, it "should be carefully applied in order to insure that it does not work to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities . . . ." *McMullan v. United States*, 686 F.2d 915 (Ct.Cl. 1982). The Court of Appeals decision in this case will create such an inequity by accepting a general finding in *Pugh* as absolute in the face of uncontradicted evidence that substantial changes had been made in the penal system after that time.

Other Courts of Appeal have likewise held that the application of collateral estoppel is proper if limited to situations in which a matter raised in a second suit is identical in *all* respects with that decided in the first *and* if controlling facts and applicable legal rules remain un-

changed. *Powers v. United States*, 424 F.2d 593 (Ct.Cl. 1970); *Sydnes v. C.I.R.*, 647 F.2d 813 (8th Cir. 1981).

In *LaRocca v. Gold*, 662 F.2d 144 (2d Cir. 1981), it was held that two requirements must be met for a party to be precluded from relitigating an issue: ". . . first, the party must have had a full and fair opportunity to contest the decision said to be dispositive of the present controversy; second, the issue must be identical to the issue of the prior action." Similarly, the Court of Appeals for the Tenth Circuit has held that "in respect to . . . the doctrine of collateral estoppel . . . the issues and parties must be the same." In re *Johnson*, 518 F.2d 246 (10th Cir. 1975), *cert. denied sub nom. Clark v. Johnson*, 423 U.S. 893, 96 S.Ct. 191, 46 L.Ed.2d 125 (1975).

As shown by these decisions of other circuits, the Eleventh Circuit in *Williams* has departed from the criteria generally recognized in the application of offensive collateral estoppel. The writ should be granted in this case on the issue of offensive collateral estoppel not only because the Eleventh Circuit's decision conflicts with this Court's decision in *Parklane* and with decisions of other Courts of Appeal, but also because the decision below will have a direct and immediate impact on so many persons who are not parties—every employee of every prison system presently operating under federal court remedial orders. This Court must act to see that offensive collateral estoppel is applied according to the same criteria in all circuits and in strict compliance with this Court's opinions.

II.

DENIAL OF GOOD FAITH IMMUNITY

In *Harlow v. Fitzgerald*, U.S. , 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), this Court held that government officials performing discretionary functions generally are shielded from liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 73 L.Ed.2d at 410. Under *Harlow*, a plaintiff must meet the burden by proving a violation of a clearly established constitutional right, by presenting evidence of the currently applicable law and that this law was clearly established at the time of the defendant's alleged wrongful action. *Harlow*, 73 L.Ed.2d at 410. The burden is upon the government official to raise the affirmative defense of qualified good-faith immunity. *Harlow*, 73 L.Ed.2d at 408.[1]

Following *Harlow*, the Eleventh Circuit Court of Appeals rendered three days apart two decisions on the qualified immunity issue, the present case, *Williams v. Bennett*, 689 F.2d 1370 (11th Cir. 1982) and *Espanola Way Corporation v. Meyerson*, 690 F.2d 827 (11th Cir. 1982), both demonstrating the Eleventh Circuit's misinterpretation, if not total disregard, of the mandates of this Court in *Harlow*. The petition for certiorari should be granted in this case to correct the Eleventh Circuit's departure from the "objective test" set forth in *Harlow*.

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[1] In *Saldana v. Garza*, 684 F.2d 1159 (5th Cir. 1982), a ruling issued slightly less than three months after *Harlow v. Fitzgerald*, the Fifth Circuit specifically held that once the defendant has asserted the defense of qualified immunity, the burden shifts to the plaintiff to rebut the good faith defense by establishing that the defendant's wrongful conduct violated clearly established law.

In the present case, the Eleventh Circuit acknowledged the ruling in *Harlow* that under the objective test defendant government officials would be shielded from liability for civil damages if their conduct did not " 'violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Williams v. Bennett*, 689 F.2d at 1385 (quoting *Harlow*, 73 L.Ed.2d at 410). Yet the Eleventh Circuit ignores the pleading and proof requirements implicit in the *Harlow* decision. It did not question whether plaintiff's evidence had demonstrated that defendants violated a *clearly established* constitutional or statutory right; it did not question whether plaintiff had presented evidence of the currently applicable law giving him the rights he claims were violated; it did not question plaintiff's proof of whether the current law was clearly established at the time of his injury. Rather, the Eleventh Circuit simply held that because the earlier case of *Pugh v. Locke*, 406 F.Supp. 318 (M.D.Ala. 1976), *aff'd with modifications sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part sub nom. Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 56 L.Ed.2d 1114 (1978) had determined that the living conditions in Alabama prisons constituted cruel and unusual punishment, "defendants are precluded from now asserting that they should not have known that failure to meet the constitutional norms established in *Pugh* would violate Williams' constitutional rights." 689 F.2d at 1386. The *Pugh* order was broad-sweeping, directing changes in the entire Alabama prison system, not just within Holman prison, and it specifically contemplated that changes within the Alabama prison system would take a considerable period of time. At the time of plaintiff's injury, changes were being made in Alabama prisons, in an effort to comply with the *Pugh* order. Plaintiff did not prove that at that time he had a clearly established right to be

free from those conditions which defendants were in the process of improving in accordance with the Court's order and that defendants should reasonably have known of this right nor that the particular condition was of constitutional dimensions. While this Court has placed the burden on plaintiff to prove his clearly established constitutional or statutory right for the purpose of defeating defendants' qualified immunity defense, the Eleventh Circuit relieved the plaintiff of any proof requirements at all, allowing the broad order of *Pugh* to sweep away any chance defendants might have to protect themselves from civil damages by asserting their right to qualified immunity.[2]

The Eleventh Circuit's decision in *Williams* tends to deprive government officials of their recognized right to assert qualified immunity as an affirmative defense. The court spoke in terms of the determination in *Pugh* as "effectively preclud[ing] the defense" and of "precluding the *assertion* of a good faith defense." 689 F.2d at 1386 [*emphasis supplied*]. Yet this Court recognized as recently as *Harlow* the right of government officials in all cases *to at least assert* the qualified immunity defense for public policy reasons. 73 L.Ed.2d at 407.

The Eleventh Circuit issued a ruling similar to *Williams* on the qualified immunity issue in *Espanola Way Corp. v.*

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[2] The Eleventh Circuit relied upon the *Pugh* order, also, to hold that defendants were collaterally estopped to litigate the issue of the conditions in Holman Prison. It then "extend[ed] the preclusive effect of *Pugh* to the qualified immunity or good faith defense of the individual defendants." 689 F.2d at 1387. Clearly, the court was unjustified in extending the theory of collateral estoppel to the distinct and separate issue of defendants' qualified immunity, which has its own pleading and proof requirements as set forth by this Court in *Harlow*.

Meyerson, 690 F.2d 827 (11th Cir. 1982), reversing the trial court's granting of a summary judgment for the defendants in that §1983 action. The *Espanola Way* court cited significant portions of *Harlow* but ignored its pleading and proof requirement which must be met to resolve the threshold qualified immunity issue using *Harlow's* objective test. The Eleventh Circuit, as in *Williams*, neither analyzed the strength of the plaintiff's evidence, nor mentioned whether plaintiff had shown the violation by defendants of a clearly established constitutional or statutory right of plaintiff of which the defendants knew or reasonably should have known. Rather, in reversing, the court relied upon such factors as the allegations of malice made by plaintiff and the fact that, in the court's opinion, the factual record was slim. The Eleventh Circuit thus directly frustrates the aims of this Court in the *Harlow* decision that unsubstantiated allegations of malice not proceed to trial and that, in such cases, the factual record need not be increased through, for example, discovery. This Court has ruled in *Harlow* that if the threshold immunity issue is not determined by plaintiff's proving a clearly established constitutional or statutory right violated by defendants, the case should proceed no further and can be resolved on summary judgment. In *Espanola Way*, the Eleventh Circuit specifically takes issue with this ruling, stating that, "there is some question as to whether summary judgment may be an appropriate means of resolving a state of mind issue, at least in the absence of a hearing". 690 F.2d at 830-831.

By its decision in *Harlow*, this Court greatly limited what has been known as the subjective aspect of the qualified immunity issue.[3] In limiting the determination of a

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[3] Defendants' research has revealed that there is a conflict emerging among the Circuits as to whether *Harlow* completely eliminated

[footnote continued]

government official's right to rely upon his qualified immunity largely to the objective test set out in *Harlow*, the Court has greatly limited the ability of defendants to establish a strong case in their defense that they acted without malice toward the plaintiff. Because defendants' right to be protected by their qualified immunity now hinges on the objective test set up in *Harlow*, courts should be meticulous in their examination of plaintiff's pleadings and evidence to insure that he has established that defendants violated a clearly established constitutional or statutory right of plaintiff of which they knew or reasonably should have known. Because the Eleventh Circuit bypasses this proof requirement in *Harlow's* objective test by readily *assuming* a clearly established constitutional right by extending the theory of collateral estoppel, it has deprived defendants of even the chance of showing their entitlement to rely upon the affirmative defense of qualified immunity. This Court should grant Petitioners' Writ to correct this ruling by the Eleventh Circuit which conflicts with *Harlow v. Fitzgerald* and to resolve the conflicts among the circuits as to its correct

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the subjective prong of the qualified immunity issue or whether it just limited that prong. Holding that *Harlow* eliminated the subjective prong are *Crowder v. Lash*, 687 F.2d 996 (7th Cir. 1982); *Saldana v. Garza*, 684 F.2d 1159 (5th Cir. 1982); and *Nakao v. Rushen*, 545 F. Supp. 1091 (N.D. Cal. 1982). Holding that *Harlow* merely limited the use of subjective analysis is *Albers v. Whitley*, 546 F. Supp. 726 (D.Or. 1982). The Eleventh Circuit in the present case acknowledges *Harlow* as causing "objective criteria now [to] govern the evaluation of a good faith defense," 689 F.2d at 1387, but then says that evidence will still be allowed as to the subjective intent of Defendants. Because of the confusion within the circuits as to the effect *Harlow* has had on the subjective component of the qualified immunity issue, the petition for writ of certiorari should be granted to give direction to the lower courts in this area.

interpretation. Unless reversed, the decision below will effectually deny the defense of qualified immunity to a large class of state officials and employees of prison and mental health systems which are presently operating under federal court remedial orders.

III.

INSTRUCTION ON STATE'S LIABILITY FOR DAMAGES

In the case below, the Eleventh Circuit held that the trial court erred in instructing the jury that the State of Alabama could not be required to pay any part of a judgment against defendants, although it neither found that the trial court had abused its discretion nor ever discussed the relevance of the trial court's discretion in giving such an instruction as this Court has recognized. It is well recognized, however, that a trial judge does have wide discretion in determining the manner and the language he will use in instructing a jury. *Robert v. Conti Carriers & Terminals, Inc.*, 692 F.2d 22 (5th Cir. 1982); *Bergstrom v. Sambo's Restaurants, Inc.*, 687 F.2d 1250 (8th Cir. 1982); *Columbia Plaza Corp. v. Security National Bank*, 676 F.2d 780 (D.C.Cir. 1982); *Kramer v. Keys*, 643 F.2d 382 (5th Cir. 1981). It is equally well established that the Eleventh Circuit should not have reversed the district judge's instructions absent a finding that he had abused that discretion. *Becker v. State of Missouri Department of Social Services*, 689 F.2d 763 (8th Cir. 1982). *Accord: Excel Handbag Co., Inc. v. Edison Brothers Stores, Inc.*, 630 F.2d 379 (5th Cir. 1980); *Trone v. Smith*, 621 F.2d 994 (9th Cir. 1980); *Aetna State Bank v. Altheimer*, 430 F.2d 750 (7th Cir. 1970).

The Eleventh Circuit not only ignored the circumstances which prompted the trial court's instruction, it also intimated, erroneously, that the State of Alabama

might be required to pay such a judgment and cited a statute which obviously would have no application to a judgment against these defendants in this type of action. *Williams v. Bennett*, 689 F.2d 1370, 1391n. 21 (11th Cir. 1982).

The trial judge had on more than one occasion directed plaintiff's counsel not to include in his argument to the jury the issue of whether the state could be required to pay a judgment against defendants. The reasons for this direction by the trial judge were specifically noted by the Eleventh Circuit: the fact that the existence of a collateral source of revenue to pay a judgment has no bearing on the fault of defendants and the fact that the absence or presence of a collateral source could induce a jury to decide a case on improper grounds. 689 F.2d at 1391. However, plaintiff's counsel persisted in injecting a possible collateral source into the case by suggesting throughout his argument that a judgment against defendants would be paid by the state. It was because of the refusal of plaintiff's counsel to abide by the court's instructions that neither counsel refer to the collateral source issue that the district judge exercised his discretion in instructing the jury in such a manner as to correct the abuses of plaintiff's counsel and stated his reasons for doing so.

Other circuits recognize that a trial court has broad discretion to control and direct the conduct of plaintiff's counsel during the trial and to regulate the scope of his argument. *Arnold v. Eastern Airlines, Inc.*, 681 F.2d 186 (4th Cir. 1982); *Redd v. Shell Oil Company*, 518 F.2d 311 (10th Cir. 1975); *Duncan v. St. Louis-San Francisco Railway Company*, 480 F.2d 79 (8th Cir. 1973); *Sepia Enterprises, Inc. v. City of Toledo*, 462 F.2d 1315 (6th Cir. 1972); *Waldron v. Hardwick*, 406 F.2d 86 (7th Cir. 1969). The Eleventh Circuit not only ignores the fact

that the district judge had this broad discretion in directing the conduct of counsel and in determining whether counsel's improper conduct has had a prejudicial effect, *Arnold v. Eastern Airlines, Inc.*, *supra*, but also made no finding that the district judge abused that broad discretion. In *Arnold*, the Court of Appeals for the Fourth Circuit held that in reviewing a trial judge's response to misconduct on the part of a party's counsel to determine whether that response constituted a prejudicial abuse of discretion, the appellate court must give "great deference for the superior vantage point of the trial judge and with a close eye to the particular context of the trial under review rather than to any general formulations of principle . . . ." 681 F.2d at 197.

In the present case, the Eleventh Circuit gave no deference whatsoever to the judgment and discretion exercised by the district judge. It simply opined that the instruction that the state could not be required to pay "*may* have created undue sympathy for defendants to the prejudice of *Williams*." 689 F.2d at 1391 [emphasis supplied]. It did not consider what effect the argument of plaintiff's counsel might have had upon the defendants in the absence of the corrective instruction.

The Eleventh Circuit's decision in regard to the action taken by the trial court is clearly in conflict with decisions of other circuits and the writ should be granted for that reason.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JAMES R. SEALE

THOMAS S. LAWSON, JR.

Counsel for Petitioners.

Office-Supreme Court, U.S.
FILED
APR 19 1983
ALEXANDER L. STEVAS,
CLERK

82-1704

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LARRY BENNETT, JR., JOHN E. VICKERS, DR. MARION CARROLL, DR. THOMAS F. STATON, J. LOUIS WILKINSON, W. S. HAMNER, JOE OLIVER, JOE RAINES, and JUDSON C. LOCKE, JR.,

Petitioners,

v.

BOBBY WILLIAMS,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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APPENDIX A

Bobby WILLIAMS, Plaintiff-Appellant,

v.

Larry BENNETT, et al.,
Defendants-Appellees.

No. 81-7037.

United States Court of Appeals,
Eleventh Circuit.

Oct. 29, 1982.

Appeal was taken from various orders and judgment of the United States District Court for the Middle District of Alabama, Truman M. Hobbs, J., in favor of defendants in civil rights action by inmate assaulted by fellow inmate, and alleging deprivation of his Eighth and Fourteenth Amendment rights. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) Board of Corrections and its officials could invoke the Eleventh Amendment so as to render them immune from suit in their official capacity; (2) District Court was without subject matter jurisdiction, either under

theory of pendent jurisdiction or pendent party jurisdiction, over assault and battery claims against inmate who assaulted plaintiff inmate; and (3) following class action in which it was determined that living conditions in state prisons constituted cruel and unusual punishment, defendants were collaterally estopped to relitigate issue of whether conditions and practices in prison in which assault occurred violated plaintiff inmate's Eighth Amendment rights; but (4) prior class action had no preclusive effect on issue of individual constitutional wrongdoing on part of defendants.

Reversed and remanded.

Appeal from the United States District Court for the Middle District of Alabama.

Before HILL and HATCHETT, Circuit Judges, and GOLDBERG *, Senior Circuit Judge.

JAMES C. HILL, Circuit Judge:

On January 10, 1978 in the Holman Prison in Atmore, Alabama, appellant Bobby

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* Honorable Irving L. Goldberg, U. S. Circuit Judge for the Fifth Circuit, sitting by designation.

Williams was assaulted by fellow inmate Larry Cook while Williams was sleeping in his dormitory bunk. Cook inflicted multiple stab wounds which rendered Williams a permanent quadriplegic. At the time of the incident, the dormitory housed medium security prisoners, and no prison guards were stationed either inside or outside the dormitory.

Williams filed a damage action in the district court under 42 U.S.C. §§ 1983, 1985, and 1986 and the eighth and fourteenth amendments against the Alabama Board of Corrections and its members, the Board's commissioner and deputy commissioner, the warden and deputy wardens of Holman Prison, and the captain and assistant captain of the guards at the prison, all in their official and individual capacities. Williams alleged that his personal injuries were the result of the deprivation of his right under the eighth amendment to be free from cruel and unusual punishment and of his right under the fourteenth amendment to be free from deprivation of life, liberty, and property without due process of law.[1] The com-

---

1. On appeal he contends that these violations are actionable not only under the Civil Rights Act of 1871—specifically 42 U.S.C. §§ 1983,

[footnote continued]

plaint also named Larry Cook as an individual defendant, alleging a state law assault and battery claim.

Prior to trial the district judge granted partial summary judgment in favor of the Alabama Board of Corrections and all other defendants, except Larry Cook, in their *official* capacities on the basis of their eleventh amendment immunity. Just after commencement of trial the state law claim against defendant Cook was dismissed for lack of subject matter jurisdiction. At the close of the evidence the court granted a directed verdict for the captain and assistant captain of the guards. A jury verdict was rendered in favor of the remaining defendants in their individual capacities and Williams appeals.

For the reasons developed below, we conclude that:

(1) The district court properly dismissed the proceedings against defendant Cook.

(2) The court properly held that, under the eleventh amendment, the Board

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1985, and 1986—but also directly under the Constitution. With respect to the availability of an implied cause of action against state officials directly under the eighth and fourteenth amendments, see part VI, C., *infra*.

of Corrections and other defendants, insofar as they were sued in their official capacities, were immune from damage liability.

(3) Prior litigation established that Williams was confined in violation of the eighth amendment and that his injuries, being the result of foreseeable peril, were at least concurrently caused by that wrongful deprivation of constitutional freedom.

(4) The injunction issued in the prior litigation is of no moment insofar as it anticipated an expected date of compliance. Although relevant to contempt proceedings, the time allowance in the injunction did not vary appellees' duties under the Bill of Rights.

(5) The defense of good faith qualified immunity is not available to appellees because prior litigation put them on notice that the conditions of confinement at the prison were unconstitutional.

(6) In order to recover, however, Williams must prove that one or more of the individual defendants acted with such callous indifference to Williams'

safety as to amount to constitutional wrongdoing, and that such wrongdoing produced the constitutional deprivation. Evidence that an individual defendant had neither the authority nor the resources to prevent the deprivation is material to this issue.

(7) The district court improperly instructed the jury that the state could not be compelled to pay any part of a judgment in favor of Williams.

(8) Williams may not maintain a *Bivins*-type action under the eighth amendment in addition to his claims under section 1983.

(9) The direction of a verdict in favor of defendants Chancery and Raines is reversed. Their liability *vel non* should be reappraised in light of our conclusions as to the applicable principles.

I PROLOGUE

In order to appraise the legal setting in which the case was tried we must direct our attention to a prior class action under 42 U.S.C. § 1983 involving conditions in the Alabama Penal system. In *Pugh v. Locke,*

406 F.Supp. 318 (M.D.Ala.1976), *aff'd with modifications sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part sub nom. Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 56 L.Ed.2d 1114 (1978), the district court held that living conditions in Alabama prisons, including exposure to the constant threat of violence from other inmates, constituted cruel and unusual punishment in violation of the eighth amendment. The court concluded that, by housing inmates "in virtually unguarded, overcrowded dormitories, with no realistic attempt . . . to separate violent, aggressive inmates from those who are passive or weak," the Alabama prison system had failed to carry out its constitutional duty to provide inmates reasonable protection from the constant threat of violence. *Id.* at 329. Accordingly, the court entered injunctive relief against, *inter alia*, the commissioner, deputy commissioner, and members of the Board of Corrections in their individual and official capacities, "their agents, employees, successors in office and any other acting in concert with them." *Id.* at 331. The decree directed that only minimum custody inmates be assigned to dormitories and that at least one guard be stationed inside and one guard outside the dormitories at all times. *Id.* at 333.

The district judge who entered the injunction in 1976 conducted hearings in September, 1978 to determine the extent of compliance with the *Pugh* order. The judge's findings and conclusions therefore covered the conditions in the Alabama prisons at the time of the incident upon which the current action is based. Having reviewed the evidence of efforts toward compliance, the court held that "[t]he very fact of confinement in Alabama's Penal System continues to contravene the Eighth and Fourteenth Amendment rights" of the inmates. *Newman v. Alabama*, 466 F.Supp. 628, 630 (M.D.Ala.1979). With respect to the state's duty to provide inmates reasonable protection from violence, the court observed:

> Defendants admit noncompliance with the requirement that guards be stationed in the living areas, including dormitories. The dormitories, they say, are too dangerous for the guards to enter. That fear is well taken. The number of reported incidents of prosecutable crimes of violence shows a steady increase over the last four years . . . .
>
> The Board has not taken the first steps to curb the pattern of violence which makes a mockery of the Eighth Amend-

> ment's protection against cruel and unusual punishment. The Board has *deliberately* ignored the requirement that guards be stationed in the dormitory units at night.

Id. at 632 (emphasis added).[2]

II THE INSTITUTION EXITS

The *Pugh* litigation determined that the conditions of Williams' confinement denied him the protection afforded prison inmates by the eighth amendment and that the cruel and unusual punishment thus inflicted was his constant exposure to the very sort of violence he experienced. The Alabama Penal System, as an institution, was being unconstitutionally operated. Williams attempted to sue the institution itself by naming as defendant the Board of Corrections and its officials and employees in their official capacities. If these defendants were proper parties for a damage suit, his task would have been far easier. However,

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2. Based upon its findings and conclusions that substantial compliance with the *Pugh* injunction had not been achieved and that the eighth amendment violation persisted, the court placed the Alabama prison system under the governance of a federal receiver. *Newman v. Alabama*, 466 F.Supp. 628, 636 (M.D.Ala.1979).

on the basis of the eleventh amendment's acknowledgement of sovereign immunity, the district court entered a partial summary judgment in favor of the Alabama Board of Corrections and its officials and employees insofar as they were sued in their official capacities. Williams now challenges the application of sovereign immunity on two grounds. Initially, he argues that the Board of Corrections should not be considered the "state" for eleventh amendment purposes. In the alternative, he argues that a recent Alabama statute should be construed as a partial abrogation of any immunity the Board may have enjoyed previously.

The eleventh amendment[3] has evolved to stand for the proposition that an unconsenting state is immune from damage suits brought in federal court by its own citizens or by citizens of another state. *Quern v. Jordan*, 440 U.S. 332, 337, 99 S.Ct. 1139, 1143, 39 L.Ed.2d 358 (1979); *Edelman*

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3. The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state.
U.S.Const. amend. XI.

v. Jordan, 415 U.S. 651, 663, 94 S.Ct. 1347, 1355, 39 L.Ed.2d 662 (1974). The amendment effectively bars such actions for monetary relief even when the state is not named as a party. If the judgment necessarily will be paid from the state treasury, and the state is the real party in interest, then the state may invoke its sovereign immunity. *Id.* 415 U.S. at 664, 94 S.Ct. at 1356; *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464, 65 S.Ct. 347, 350. 89 L.Ed. 389 (1945). Although Williams maintains that the Board of Corrections is amenable to suit because it is political subdivision operating independent of the state,[4] his argument is precluded by the Supreme Court's decision in *Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 56 L.Ed.2d 1114 (1978). In *Alabama v. Pugh*, the Court concluded:

> There can be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amend-

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4. Independent local political subdivisions are not entitled to eleventh amendment immunity. *Lake Country Estates, Inc. v. Tahoe Planning Agency*, 440 U.S. 391, 400–01, 99 S.Ct. 1171, 1176–77, 59 L.Ed.2d 401 (1979). *See generally Laje v. R.E. Thomason General Hospital*, 665 F.2d 724, 727 (5th Cir. 1982).

ment, unless Alabama has consented to the filing of such a suit.

438 U.S. at 782, 98 S.Ct. at 3057 (citation omitted).[5]

Recognizing that the Board and its officials may invoke the eleventh amendment when sued in their official capacity, we turn now to plaintiff's contention that the state has since elected to waive its constitutional

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5. Williams argues that *Alabama v. Pugh* should not control because the Court stated, "Respondents do not contend that Alabama has consented to this suit . . . ." 438 U.S. at 782, 98 S.Ct. at 3057. Because the issue was not raised, he claims, it should not be given stare decisis effect. A more complete reading of the Court' opinion, however, reveals that Alabama properly raised the issue on appeal and that it was not contested because such a contest would prove futile:

> Respondents do not contend that Alabama has consented to this suit, and it appears that no consent could be given under Art. I, § 14, of the Alabama Constitution, which provides that "the State of Alabama shall never be made a defendant in any court of law or equity." Moreover, the question of the State's Eleventh Amendment immunity is not merely academic. Alabama has an interest in being dismissed from this action in order to eliminate the danger of being held in contempt if it should fail to comply with the mandatory injunction.

Id.

immunity by consenting to such suits. In 1979, the Alabama legislature enacted a statute in which the state agreed to pay up to $100,000 for judgments awarded against officials and employees of the Board of Corrections. Ala.Code § 41–9–74 (1981 Supp.).[6] Williams maintains that by enact-

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6. Board to pay judgments against board of corrections officials; limitations, exceptions, etc.

(a) As part of the consideration of the employment or appointment of the commissioner of the board of corrections, deputy commissioners of the board of corrections, members of the board of corrections and other officers, employees and agents of the board of corrections, whether part time or full time, the board of adjustment shall pay all final judgments awarded in courts of competent jurisdiction against the aforesaid commissioner, deputy commissioner, members of the board of corrections, officers, employees and agents, for acts arising out of and performed in connection with their official duties in behalf of the state of Alabama, except to the extent that such coverage may be provided by an insurance carrier.

(b) Payment shall be limited to a maximum of $100,000 for all claims arising out of the same act.

(c) No part of this section shall be admissible evidence in any court of law wherein any of the officers or persons idemnified herein are parties. Nothing in this section shall be deemed to waive the sovereign immunity of the state with

[footnote continued]

ing this statute the legislature intended to effectuate a limited waiver of eleventh amendment immunity. We disagree.

Waiver of a state's eleventh amendment immunity can be found only when evidenced "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Edelman*, 415 U.S. at 673, 94 S.Ct. at 1360 (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171, 29 S.Ct. 458, 464, 53 L.Ed. 742 (1909).); *accord Florida Department of Health & Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147,

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respect to a claim covered under this section or to authorize the payment by the state of any judgment or settlement against the aforesaid commissioner, deputy commissioner, members of the board of corrections, officers, employees and agents, to the extent that the same exceeds the sum of $100,000.

(d) The provisions of this section shall not apply to the commissioner, any deputy commissioner, any member of the board of corrections and any other officer, employee and agent of the board of corrections who is found guilty of gross negligence or intentional or knowingly unlawful behavior.

Ala.Code § 41-9-74 (1981 Supp.).

150, 101 S.Ct. 1032, 1034, 67 L.Ed.2d 132 (1981). In evaluating the statute for evidence of waiver, we therefore begin with an analysis of its language. The introductory paragraph of section 41–9–74 states that Alabama will pay final judgments awarded against Board officials in suits arising out of official acts "[a]s part of the consideration of the employment or appointment" of the individuals. Ala.Code § 41–9–74(a) (1981 Supp.). This language suggests that the statute was designed to be an employment benefit, analogous to liability insurance, for any Alabama correctional employee who may be sued individually for acts arising in the course of employment. *Cf. Reeves v. City of Jackson*, 608 F.2d 644, 654 n.6 (5th Cir. 1979) (a state municipality does not waive its immunity by purchasing liability insurance). Section 41–9–74 makes no mention of suits against the state or against the Board itself as an independent political body. Instead, the statute indicates that its indemnity provision runs to individuals by specifically listing those employees who may claim the benefit of its coverage. In addition, the provision that awards will be paid only to the extent that coverage is not provided by an insurance carrier suggests

further that payments pursuant to the statute were intended to be nothing more than an insurance supplement for individuals, *see* Ala.Code § 41–9–47(a), and perhaps to afford some measure of relief to plaintiffs required to sue those who might otherwise be judgment proof individuals.

Williams relies most heavily on paragraph (c) of the statute by arguing that the legislature considered sovereign immunity, but decided to waive its protection insofar as a particular judgment did not exceed $100,000. This construction of the statute, however, ignores a clause which alters the meaning of paragraph (c). The relevant language reads as follows:

> "Nothing in this section shall be deemed to waive the sovereign immunity of the state with respect to a claim covered under this section *or* to authorize the payment of any judgment or settlement against aforesaid commissioner, deputy commissioner, members of the board of corrections, officers, employees and agents, to the extent that the same exceeds the sum of $100,000.

Id. § 41–9–74(c) (emphasis added). We are not persuaded that this provision expresses the intent of the legislature to waive sover-

eign immunity; rather, the legislature appears to reaffirm Alabama's sovereign immunity and simply to limit payments made pursuant to the statute to $100,000.

Our construction of section 41–9–74 is consistent with Alabama's traditional reluctance to waive its sovereign immunity. For example, the Alabama Constitution unequivocally states "That the State of Alabama shall never be made a defendant in any court of law or equity." Ala.Const. art. I, § 14. Moreover, the Alabama Supreme Court consistently maintains that "[s]ince our Constitution unequivocally prohibits suits against the state, the legislature may not consent to such a suit."[7] *Armory Com-*

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7. Williams attempts to disclaim such pronouncements by the Alabama Supreme Court by referring to that portion of the Alabama Constitution vesting with the legislature the power and duty "to enact all laws necessary to give effect to the provisions of this Constitution." Ala.Const. art. XVII, § 282. In an exercise of this power, Williams maintains that the legislature has excluded the Board of Corrections from the protection of sovereign immunity by subjecting the Board and its officials to "all legal restrictions, limitations, conditions and penalties, civil and criminal . . . ." Ala. Code § 14–1–10 (1975). This argument fails, however, because section 14–1–10 was in effect

[footnote continued]

mission v. Staudt, 388 So.2d 991, 992 (Ala. 1980); *accord Druid City Hospital Board v. Epperson*, 378 So.2d 696, 697 (Ala.1979); *Dunn Construction Co. v. Board of Adjustments*, 234 Ala. 372, 175 So. 383 (1937). Because of Alabama's unequivocal affirmation of sovereign immunity, and because section 41–9–74 fails to represent a clear expression of intent to waive that immunity

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at the time the Supreme Court determined that the Alabama Board of Corrections could invoke eleventh amendment immunity. *Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 56 L.Ed.2d 1114 (1978). At that point, the Court concluded that apparently the Alabama legislature could not waive the state's sovereign immunity. 438 U.S. at 782, 98 S.Ct. at 3057. We also note that section 14–1–10 was modified by a 1979 act by the legislature which abolishes the Board of Corrections and transfers all responsibilities and liabilities to the Governor of Alabama. Ala.Code § 14–1–15 (1981 Supp.). To the extent that section 14–1–10 may be inconsistent with the new organization of Alabama's penal system it no longer has effect. *Id.* Nevertheless, Williams urges us to read section 14–1–10 in conjunction with section 41–9–74 to find the requisite evidence of intent to waive sovereign immunity. Because such a reading fails to provide us with a clear expression of the intent to waive the constitutional protection, we reject the argument.

in federal court,[8] we hold that the Board may not be subject to suit; however, while its officials and/or employees may not be sued in their official capacities, they are, individually subject to suits for acts or omissions in connection with their official duties. The grant of partial summary judgment is affirmed.

III DEFENDANT COOK EXITS

The district court dismissed the assault and battery claims against defendant Larry Cook for lack of subject matter jurisdiction. On appeal, Williams urges that Cook's dismissal was improper because the court had pendent jurisdiction over these state law claims. We disagree.

A federal court may exercise pendent jurisdiction over state law claims by parties properly before it, provided the federal and state law claims derive from a common nucleus of operative fact and that

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8. At least one federal circuit has ruled that the waiver must extend explicitly to suits in federal court. *Montana v. Peretti*, 661 F.2d 756, 758 (9th Cir. 1981) (citing *Florida Dep't of Health & Rehabilitative Services v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150, 101 S.Ct. 1032, 1034, 67 L.Ed.2d 132 (1981).).

adjudication of the state claim will not prove inconvenient or unfair to the litigants or unduly burden the proceedings. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); *Jackson v. Stinchcomb*, 635 F.2d 462 (5th Cir. 1981); *Silva v. Vowell*, 621 F.2d 640 (5th Cir. 1980), *cert. denied*, 449 U.S. 1125, 101 S.Ct. 941, 67 L.Ed.2d 111 (1981). Implicit in the traditional concept of pendent jurisdiction is that the court already has jurisdiction over all the parties involved, whether because they are diverse or because a substantial federal claim has been asserted against the defendant. Here, however, Cook was not a diverse party. Nor was any substantial federal claim asserted against him. Because Cook is not a state official, he was not involved in the section 1983 claim. Moreover, Williams failed to proffer sufficient evidence to maintain that Cook and state correctional officials conspired to deprive Williams of his constitutional rights in violation of 42 U.S.C. § 1985(3) (1976). *See Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971); *Crowe v. Lucas*, 595 F.2d 985 (5th Cir. 1979).

Accordingly, the only possible source of jurisdiction over the state law

claim against Cook lies in the nascent concept of pendent party jurisdiction. Under this theory, a court in some limited circumstances may bring in "state" parties over which it could not otherwise exercise jurisdiction. *See Aldinger v. Howard*, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1377 n.7 (5th Cir. 1980); *Boudreaux v. Puckett*, 611 F.2d 1028, 1030–31 (5th Cir. 1980); *see, e.g., Connecticut General Life Insurance Co. v. Craton*, 405 F.2d 41 (5th Cir. 1968). The exercise of such pendent party jurisdiction turns on judicial economy considerations and whether ". . . Congress has expressly or impliedly negated the existence of jurisdiction of a pendent claim or party." *Boudreaux*, 611 F.2d at 1031.[9]

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9. As the Supreme Court explained in *Aldinger*:

> If the new party sought to be joined is not otherwise subject to federal jurisdiction, there is a more serious obstacle to the exercise of pendent jurisdiction than if parties already before the court are required to litigate a state-law claim. Before it can be concluded that such jurisdiction exists, a federal court must satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence.

427 U.S. at 18, 96 S.Ct. at 2422.

The exercise of pendent party jurisdiction already has been rejected in the context of diversity jurisdiction. *Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978). Although we recognize that the policies supporting federal question jurisdiction differ from those supporting diversity jurisdiction and thus may compel a different approach to pendent party jurisdiction in federal question cases, *see generally* Note, *A Closer Look at Pendent and Ancillary Jurisdiction: Toward a Theory of Incidental Jurisdiction,* 95 Harv.L.Rev. 1935, 1942–43 (1982), we need not resolve the issue. The exercise of pendent jurisdiction is a discretionary decision reserved to the district court. *See Jackson supra,* 635 F.2d at 472–73; *Gregory v. Mitchell,* 634 F.2d 199, 202 (5th Cir. 1981). As such, the district court was in the best position to determine if joinder of the state law claim against Cook would interfere with the disposition of Williams' federal civil rights claim. We are not faced here with a case of a federal court accused of exercising jurisdiction beyond that authorized by Congress. Instead, we are presented with a case where a trial judge, acting within his discretion, chose not to exercise pendent party jurisdiction and deferred to state courts resolution of the state law

claim of assault and battery.[10] In light of the tenuous nature of pendent party jurisdiction and its emphasis on judicial economy, we conclude that the court acted within its discretion in dismissing defendant Cook.

IV THE CASE REMAINING

With Cook dismissed from the suit and the Alabama Prison System immune from damage liability, Williams is left with claims against the remaining defendants in their individual capacities. Because of the *Pugh* decision, proof of actionable wrongdoing by the prison system, in its corporate form, would appear to have been a straightforward matter. The case remaining against the individuals working in various capacities in the system, however, is far

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10. Williams also maintains that, even if the court did not have subject matter jurisdiction, the fact that Cook's dismissal came after two days of testimony was prejudicial to Williams' case. We find no merit in this position. The district court clearly explained to the jury that Cook's dismissal did not reflect on Williams' claims against the other defendants or against Cook himself for that matter. The court stated that the claim against Cook was brought in good faith, but would be better adjudicated in a state court. Record, at 904–06.

more complicated. Thus, before we evaluate the effect of *Pugh* on the remaining case, we find it important to focus on the nature of Williams' prima facie case under 42 U.S.C. § 1983 for violation of his eighth amendment rights.[11]

"In order to state a § 1983 cause of action against prison officials based on a constitutional deprivation resulting from cruel and unusual punishment, there must be at least some allegation of a conscious or callous indifference to a prisoner's rights, thus raising the tort to constitutional stature." *Wright v. El Paso County Jail,* 642 F.2d 134, 136 (5th Cir. 1981). *Accord Estelle v. Gamble,* 429 U.S. 97, 106, 97 S.Ct. 285, 292, 50 L.Ed.2d 251 (1976); *Woodall v. Foti,* 648 F.2d 268, 272 (5th Cir. 1981) (per curiam). To establish a deprivation of his eighth amendment rights, Williams therefore must bear the burden of proving deliberate indifference on the part of each of the defendant officials to his need for reasonable protection from violence. Only this de-

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11. The eighth amendment's ban on cruel and unusual punishment was first made applicable to the states by virtue of the fourteenth amendment in *Robinson v. California,* 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

gree of disregard for a prisoner's rights "can offend 'evolving standards of decency' in violation of the Eighth Amendment" and can separate official conduct that is actionable under section 1983 from simple negligence which is not actionable under section 1983. *Estelle v. Gamble*, 429 U.S. at 106, 97 S.Ct. at 292.

Section 1983 imposes additional proof requirements when that statute is used as the vehicle to vindicate substantive constitutional rights. The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . *subjects, or causes to be subjected,* any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. The italicized language plainly requires proof of an affirmative causal connection between the actions taken by a particular person "under color of state law" and the constitutional deprivation. *See Monell v. Department of Social Services*, 436 U.S. 658, 692, 98 S.Ct. 2018, 2036,

56 L.Ed.2d 611 (1978) (causation requirement precludes imposition of vicarious liability on municipality for acts of its employees absent proof that execution of official policy inflicts injury); *McLaughlin v. City of LaGrange*, 662 F.2d 1385, 1388 (11th Cir. 1981) (per curiam); *Rheuark v. Shaw*, 628 F.2d 297, 305 (5th Cir. 1980), *cert. denied*, 450 U.S. 931, 101 S.Ct. 1392, 67 L.Ed.2d 365 (1981).

In *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), the Supreme Court expounded on the nature of the causal link which must be established. Under review in *Rizzo* was the entry of injunctive relief against the mayor, police commissioner, and other officials of the City of Philadelphia in a section 1983 action alleging a pervasive pattern of police mistreatment of minority citizens and of Philadelphia residents in general. The Court reversed the judgment of the district court, finding fault with the theory of liability upon which it was based. Specifically, the Court disapproved the imposition of liability for the officials' failure to act in the face of a statistical pattern of police misconduct absent proof that the supervisory defendants had "*direct responsibility* for the actions" of those police officers who had engaged in

the misconduct. *Id.* at 375–76, 96 S.Ct. at 606 (emphasis added). The former Fifth Circuit also has elaborated on the necessary causal link between officials' acts or omissions and the constitutional deprivation. " 'Personal participation' is only one of several theories which can be used to establish causation .... Another theory ... is that a supervisory defendant is subject to § 1983 liability when he breaches a duty imposed by state or local law, and this breach causes plaintiff's constitutional injury." *Sims v. Adams,* 537 F.2d 829, 831 (5th Cir. 1976) (citations omitted). From *Rizzo* and *Sims* it is clear that the inquiry into causation must be a directed one, focusing on the duties and responsibilities of each of the individual defendants whose acts or omissions are alleged to have resulted in a constitutional deprivation.

Thus, in order to prevail against any one of the individual defendants, Williams must prove the following:

1. That being confined in a dormitory with inmates other than minimum security inmates without guards being present deprived him of his eighth amendment right to be free from cru-

el and unusual punishment because of the danger of violence.

2. That the individual defendant intentionally, or by callous indifference, was a cause of the constitutional deprivation.
3. That this deprivation was a legal cause of his injuries.

Williams contends that the *Pugh* litigation collaterally estops defendants from relitigating the issue of whether he (and other inmates of Holman Prison) was deprived of his right to be free from cruel and unusual punishment by exposure to violence. For this reason, Williams continues, the district court erred in admitting evidence of defendants' good faith attempts to comply with the dictates of the *Pugh* injunction. We agree only in part with Williams' argument.

V *PUGH* IN PERSPECTIVE

The *Pugh* litigation, the findings and conclusions of the court, and the injunctive relief granted, have been woven into this case from the start. It is from this perspective that we evaluate the principles of preclusion and their proper place in these proceedings.

A.

Preclusive effect will be given to the adjudication of an issue litigated in a prior proceeding if the issue in the subsequent proceeding is identical to the one involved in the prior action, the issue was actually litigated, and the determination of the issue was necessary in the prior action. *Stovall v. Price Waterhouse Co.*, 652 F.2d 537, 540 (5th Cir. 1981); *Johnson v. United States*, 576 F.2d 606, 615 (5th Cir. 1978). In the present case Williams seeks to estop the defendants from relitigating issues they purportedly litigated and lost in the *Pugh* action, thus invoking the offensive use of collateral estoppel. In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), the Supreme Court granted federal trial courts broad discretion to permit the offensive use of collateral estoppel,[12] indicating, however, that the ex-

12. In *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), the Court announced the applicability of collateral estoppel to section 1983 actions. Although that case specifically upheld the defensive use of collateral estoppel, the Court cited with approval the preclusion principles of *Parklane Hosiery*. *Id.* 449 U.S. at 94, 101 S.Ct. at 414. The defendants in this appeal have not questioned the availability of offensive collateral estoppel in a section 1983 action.

ercise of this discretion is circumscribed by considerations of fairness to the defendant in foreclosing relitigation of an issue. *Id.* 439 U.S. at 331–32, 99 S.Ct. at 651–52. A trial judge may justifiably refuse to allow offensive use of collateral estopel if the defendant did not have an incentive to litigate the issue vigorously in the prior proceeding or if the defendant did not have a full and fair opportunity to litigate it. *Id.* at 332, 99 S.Ct. at 652.

Under the circumstances of this case we conclude that the defendant officials are collaterally estopped to relitigate the issue of whether the conditions and practices in Holman Prison violated Williams' eighth amendment right to be free from cruel and unusual punishment. The parties there actually litigated, and the district court necessarily decided, one of the same basic issues at stake in this action—namely, whether the conditions and practices to which Williams was exposed as an inmate of Holman, including the failure adequately to guard dormitories and to assign only minimum security prisoners to dormitories, amounted to cruel and unusual punishment. To state it more precisely, the *Pugh* decision forecloses relitigation on the

issue of whether Williams was denied reasonable protection from violence. That decision, however, does not preclude litigation on the issue of the degree of culpability of each defendant—that is, whether each defendant exhibited "deliberate indifference," which was a producing cause of the eighth amendment violation.

We do not perceive an unfairness in estopping the defendants' relitigation of the eighth amendment issue. All of the current defendants—with the exception of the warden, deputy warden, captain, and assistant captain of the guards at Holman—or their predecessors in office were named defendants in the *Pugh* litigation.[13] In light of the serious constitutional violations alleged and the broad declaratory and injunctive relief sought in *Pugh*, the defendants had every incentive to litigate the eighth amendment issue fully and vigorously. The journey of the case through the appellate courts evidences the fact of their vigorous defense. *See Newman v. Alabama*, 559

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13. Those officials not named as defendants in *Pugh* were nevertheless bound by the injunction as "agents, employees successors in office [or] any others acting in concert with" the named defendants. *Pugh v. Locke*, 406 F.Supp. at 331.

F.2d 283 (5th Cir. 1977), *rev'd in part sub nom, Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 56 L.Ed.2d 1114 (1978). Moreover, there are no procedural opportunities in the present case that were unavailable to the *Pugh* defendants and of a kind that would be likely to alter the resolution of the eighth amendment issue. *See Parklane Hosiery*, 439 U.S. at 332 n. 19, 99 S.Ct. at 652 n. 19.

Although not stated with the desired precision, Williams' counsel did move "... for a directed verdict in regard to the question of cruel and unusual punishment." Record, at 1115. Indeed, the motion was somewhat lost among other motions which were far from deserved. Nevertheless, without suggesting that everything moved for in the same oration had merit, a directed finding of cruel and unusual punishment should have been made by the district court.

B.

The degree of culpability of each of the individual defendants and his causal role in the physical injuries suffered by Williams as a result of his exposure to the constant threat of violence present us with a different matter. As we have pointed out above,

only a gross deviation from the standard of care owed—specifically in this case a callous indifference to Williams' need for protection from violence—is actionable as an eighth amendment violation under section 1983. In our view, *Pugh* does not estop each of the current defendant officials from attempting to establish that he did not exhibit such deliberate indifference. Although the district judge involved in the *Pugh* litigation castigated the state for its failure to take seriously its responsibility for operating its prisons in conformity with constitutional mandates, at times referring to the deliberate disregard of steps ordered in the *Pugh* injunction, *see, e.g., Newman v. Alabama*, 466 F.Supp. 628, 632 (M.D.Ala. 1979), it is clear that *Pugh* did not resolve the state of mind or intent of any particular one of the current defendants in failing to perform acts within his official responsibility. Hence one of the prerequisites of collateral estoppel, identity of these issues in the prior and subsequent actions, is missing here. The district court's comments in *Pugh* addressed the corporate fault of the state officialdom with responsibility for operation of the Alabama penal system, not the existence of *individual* fault on the part of each of—or any one of—the current de-

fendants.[14] The latter focus is critical here. For example, it would be unfair to penalize with personal monetary liability an individual Board of Corrections member whose vigorous efforts to hire sufficient prison guards, or to assign available guards so as adequately to staff the dormitories, were overruled by the contrary views of a majority of the Board. On the other hand, it would be highly relevant to the establishing of personal liability to introduce evidence that an individual defendant, having jurisdiction over an adequate number of guards and over Williams' dormitory at the time of the stabbing announced: "I'm not going to station a guard in that dorm. Those prisoners deserve what they can do to one another." Such matters remain to be litigated.

Accordingly, we conclude that *Pugh* has no preclusive effect on the issue of individual constitutional wrongdoing. Our examination of the *Pugh* litigation convinces us that the causation element in that

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14. *Cf. Montana v. United States*, 440 U.S. 147, 164 n. 11, 99 S.Ct. 970, 979 n. 11, 59 L.Ed.2d 210 (1979) ("Redetermination of issues is warranted if there is reason to doubt the quality, *extensiveness*, or fairness of the procedures followed in the prior litigation.") (emphasis added).

case is not identical to the causation requirement at issue here. To be sure, as the language of section 1983 plainly requires, a causal connection between the constitutional deprivation and the defendants' acts or omissions is as much an element of liability for purposes of entering injunctive relief in *Pugh* as it is in the present damages action. *See, e.g., Rizzo v. Goode,* 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1979) (injunctive relief). It also is clear that the parties in *Pugh,* collectively, as the corporate officialdom, were in a position to end the constitutional violation. However, when individuals are being sued in individual capacities for damages for personal injuries, the causation inquiry must be more refined and focused than that undertaken in *Pugh,* where only declaratory and injunctive relief were sought for constitutional violations pervading an entire prison system. In *Pugh* the focus for causation purposes was on whether the combined acts or omissions of all state officials with some responsibility for operation of the Alabama penal system created living conditions in the prisons which violated the eighth amendment. Thus the approach of the district court in *Pugh* was broad and generalized. From that approach ensued a sweeping injunction

against all officials with any responsibility with respect to the prisons' operation. By contrast, the critical causation issue here must be whether each individual defendant was in a position to take steps that could have averted the stabbing incident at Holman but, through callous indifference, failed to do so.[15] Resolution of this issue necessarily entails a very individualized approach, taking into account the duties, discretion and means of each defendant.

There can be no duty, the breach of which is actionable, to do that which is beyond the power, authority, or means of the charged party. One may be callously indifferent to the fate of prisoners and yet not be liable for their injuries. Those whose callous indifference results in liability are those under a duty—possessed of authority and means—to prevent the injury.

We find support for our holding that *Pugh* has a preclusive effect on the eighth amendment issue but not on the issues of individual liability in a former Fifth Circuit case arising from a very similar factual

15. A clear showing of lack of responsibility by one or more of the defendants would have had only incidental impact upon the real issue in *Pugh*—*i.e.*, grant of injunction vel non.

background. In *Bogard v. Cook*, 586 F.2d 399 (5th Cir. 1978), *cert. denied*, 444 U.S. 883, 100 S.Ct. 173, 62 L.Ed.2d 113 (1979), the plaintiff, a former prisoner in the Mississippi State Penitentiary, sued prison officials under 42 U.S.C. § 1983 for damages arising from, *inter alia*, a stabbing by a fellow inmate that had rendered him a permanent paraplegic. The plaintiff had participated in a prior prisoners' class action under section 1983 and other civil rights statutes against various state officials. *Gates v. Collier*, 349 F.Supp. 881 (N.D.Miss.1972), *aff'd*, 501 F.2d 1291, 1322 (5th Cir. 1974). In *Gates* the plaintiff class had secured broad declaratory and injunctive relief from, *inter alia*, violations of the inmates' eighth amendment rights through the officials' failure to provide adequate protection against physical assaults by other inmates. The district court's holding was affirmed on appeal, with the circuit court adopting the trial court's finding of fact and conclusions of law as its own. *Gates v. Collier*, 501 F.2d 1291, 1322 (5th Cir. 1974). On appeal of the plaintiff's subsequent damage action of personal injuries, the former Fifth Circuit was called upon to determine the effect of the prior *Gates* litigation on the plaintiff's case. The defendant officials argued that res ju-

dicata barred the plaintiff's entire damage suit because, as a member of the *Gates* class, he could have litigated the personal injury claim in the prior action. The plaintiff contended that the defendants were collaterally estopped by the *Gates* suit from attacking certain findings regarding the unconstitutionality of the prison conditions. The court rejected the res judicata argument for essentially the same reasons that prompt us to deny collateral estoppel on the deliberate indifference and causation issues and permitted collateral estoppel on the constitutionality of the prison conditions just as we do now. *See Bogard v. Cook*, 586 F.2d 399, 409 (5th Cir. 1978), *cert. denied*, 444 U.S. 883, 100 S.Ct. 173, 62 L.Ed.2d 113 (1979).

C.

Despite the necessity of litigating each defendants' responsibility for the prison's condition, the *Pugh* findings preclude defendants' contention that the unconstitutional condition under which Williams was forced to live was not a proximate cause of his injuries. In reaching this conclusion, we distinguish between the individualized causation requirement (proof that a defendant

contributed to the unconstitutional prison conditions), and the more generalized causation requirement (proof that the unconstitutional prison conditions contributed to Williams' injuries). Although the former remains to be litigated with respect to each individual defendant, the latter was litigated effectively in the prior suit.

In the absence of *Pugh*, proof of intentional wrongdoing by someone other than the defendant (in this case Cook) might put in issue the causal connection between the proven default of the defendant and the injury. However, *Pugh* was specific on this point. Confining medium and maximum security risk prisoners in a dormitory without the presence of a guard inevitably exposes each inmate to violent injury at the hands of other inmates. *Pugh*, 406 F.Supp. at 325, 329–30, 333; *see also Newman*, 466 F.Supp. at 632. It was because of this causal connection that the following requirements, *inter alia* were included in the *Pugh* order: (1) "[o]nly minimum custody inmates may be assigned to dormitories;" (2) "guards shall be stationed inside living areas, including dormitories, at all times;" and (3) "[t]here shall be at least one guard inside and one guard outside, all living areas at all times." 406 F.Supp. at 333. The

Pugh case therefore determined that the defendant prison officials must have foreseen that mixed unguarded dormitories would fester violence, and that they had a duty to provide their inmates with reasonable protection. *See* 406 F.Supp. at 329; *see also Gates v. Collier,* 501 F.2d 1291, 1308–09 (5th Cir. 1974). Thus, if an individual defendant is shown to have caused Williams to be housed in this mixed and unguarded fashion, through intentional conduct or callous indifference, then such action or omission was one of the causes of Williams' injuries. Williams need not prove that a particular defendant must have foreseen the specific injuries suffered as a result of the assault.

D.

Similarly, we extend the preclusive effect of *Pugh* to the qualified immunity or good faith defense of the individual defendants. When sued in their individual capacities for damages under section 1983, defendant officials generally may assert a good faith defense. *Wood v. Strickland,* 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Scheuer v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). The parameters of this defense recently were clar-

ified by the Supreme Court in *Harlow v. Fitzgerald,* —— U.S. ——, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982):

> Decisions of this Court have established that the "good faith" defense has both an "objective" and a "subjective" aspect. The objective element involves a presumptive knowledge of and respect for "basic, unquestioned constitutional rights." *Wood v. Strickland,* 420 U.S. 308, 320 [95 S.Ct. 992, 999, 43 L.Ed.2d 214] (1975). The subjective component refers to "permissible intentions." *Ibid.* Characteristically the Court has defined these elements by identifying the circumstances in which qualified immunity would *not* be available. Referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official "*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action *with malicious intention* to cause a deprivation of constitutional rights or other injury . . . ." *Id.,* at 321–322 [95 S.Ct. at 1000] (emphasis supplied).

102 S.Ct. at 2737. *Harlow* involved the good faith defense afforded presidential aides. After examining the policies underlying the immunity, the Court further refined the defense by holding "that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* —— at ——, 102 S.Ct. at 2739 (citations omitted). Thus, objective criteria now govern the evaluation of a good faith defense.

To the extent that good faith is defined essentially in objective terms, if defendants should have known that their conduct in maintaining an unconstitutional prison violated Williams' rights, then their good faith defense will be defeated. In the context of the present case, the *Pugh* order not only clearly defined the constitutional rights of the Alabama prisoners, but also served to put the defendant officials on notice of the continuing violations. As the court stated in *Pugh:*

> In *Wood v. Strickland,* 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975), the Supreme Court held that, under Section

> 1983, plaintiffs can recover money damages from state officials if the officials acted either in bad faith or in "disregard of settled, indisputable law." *Id.* at 321, 95 S.Ct. 992. To put it another way: a public official may be held liable where he, in subjective good faith, acts in disregard of a person's "clearly established constitutional rights." *Id.* at 322, 95 S.Ct. 992. The Court now acts in these cases with a recognition that prisoners are not to be coddled, and prisons are not to be operated as hotels or country clubs. However, this does not mean that responsible state officials, including the Alabama Legislature, can be allowed to operate prison facilities that are barbaric and inhumane. *Let the defendant state officials now be placed on notice* that failure to comply with the minimum standards set forth in the order of this Court filed with this opinion will necessitate the closing of those several prison facilities herein found to be unfit for human confinement.

406 F.Supp. at 331 (emphasis added). Thus, defendants are precluded from now asserting that they should not have known that failure to meet the constitutional norms

established in *Pugh* would violate Williams' constitutional rights. Although this is not preclusion in the sense that the good faith defense was litigated in the earlier suit, the determination of a constitutional violation in *Pugh* effectively precludes the defense because of the court's clear delination of the prisoners' rights.

In precluding the assertion of a good faith defense by an individual defendant, however, we do not disallow the admission of evidence demonstrating the subjective intent of a defendant. As discussed above, a claim alleging a constitutional deprivation of cruel and unusual punishment requires proof of deliberate or callous indifference on the part of each defendant. The focus of this inquiry necessarily centers on individual motives and reactions. Moreover, evidence tending to prove deliberate or callous indifference is the same evidence which would have been used to defeat a good faith defense under the subjective criteria. *Fielder v. Bosshard*, 590 F.2d 105, 110 (5th Cir. 1979); *see also Fowler v. Cross*, 635 F.2d 476, 482 (5th Cir. 1981); *Bogard v. Cook*, 586 F.2d 399, 412 (5th Cir. 1978), *cert. denied*, 444 U.S. 883, 100 S.Ct. 173, 62 L.Ed.2d 113 (1979). Because of the required proof of deliberate or callous indif-

ference, therefore, the subjective good faith and intent of the individual defendants remain relevant even in light of the objectivity now associated with the good faith defense.

E.

Before closing our discussion of collateral estoppel, we find it necessary to comment on the distinction between the findings of the district court in *Pugh* and its subsequent injunction. *Pugh* has a preclusive effect on the present case because its findings established that the conditions at the prison constituted cruel and unusual punishment in violation of the eighth amendment at the time Williams was assaulted. Because the failure to maintain the prison in countenance with the constitution violated Williams' right to be free from cruel and unusual punishment, Williams need not prove that he was the victim of a constitutional violation. The obstacle now facing Williams is the attachment of legal responsibility for his injuries to one or more of the defendants. This will require proof of callous indifference.

Nevertheless, a defendant may not avoid liability by relying on the timetable seen as

having been incorporated in the district court's injunction in *Pugh*. Having made his findings in *Pugh*, the district judge may well have contemplated that a considerable period of time would be necessary to correct the deficiencies in the Alabama prisons. *See* 406 F.Supp. at 332. Defendants in this case appear to have successfully argued that they could not have been guilty of any wrongdoing in continuing unconstitutional conditions so long as the conditions were corrected within the time allowed by the *Pugh* injunction.[16] This simply is incorrect. The district judge in *Pugh* did not undertake to amend the constitution by suspending it for a certain period of time. The fact that the court did not require correction of the conditions by immediate mandatory injunction, does not absolve the state or the

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16. The district court even instructed the jury that this was a proper defense:

> If you find that the defendants did not violate the Court's order with respect to the stationing of guards at Holman Prison or providing individual cells for medium security prisoners because the order did not require such accomplishment by January 10, 1978, then the defendants would not be liable for such failure to accomplish compliance of the order by January 10, 1978.

Record, at 1238.

individual defendants of liability for constitutionally related injuries arising in the interim. Time given in an injunction is no license to exercise callous indifference for awhile. Although contempt may be avoided during this time, the possibility of liability continues to exist. Indeed, even in the absence of the *Pugh* case, an inmate who could prove injury resulting from unconstitutionally cruel and unusual punishment would have a viable cause of action. No one is permitted to violate the constitution until a judge has found the violation to exist, and, where one has been found to exist, no one is entitled to continue unconstitutional action, free of liability, until the time set in an injunction for its correction. It is the finding of unconstitutionality in *Pugh* which is relevant to the present case, not the correction time limits included in the *Pugh* injunction.

VI JURY INSTRUCTIONS

Williams also raises a series of challenges to the jury instructions given by the trial court. He complains further that the court refused to give other relevant instructions. We address each of these challenges individually.

A.

Initially, Williams claims reversible error in the district judge's instruction that the jury could consider the lack of sufficient funds to comply with the *Pugh* order in deciding whether defendants used all reasonable effort to comply and acted in good faith. Lack of funds, he argues, is not a defense to a claim of deprivation of a constitutional right. *See Smith v. Sullivan*, 611 F.2d 1039, 1043–44 (5th Cir. 1980); *Williams v. Edwards*, 547 F.2d 1206, 1212–13 (5th Cir. 1977); *Wyatt v. Aderholt*, 503 F.2d 1305, 1315 (5th Cir. 1974); *Gates v. Collier*, 501 F.2d 1291, 1319–20 (5th Cir. 1974). Although defendants do not deny that lack of funds generally will not defeat a claim alleging a constitutional violation, they argue the unfairness of disallowing the defense when officials are sued in their individual capacities and are powerless to control legislative appropriations that would facilitate compliance.

Defendants clearly may not escape liability solely because of the legislature's failure to appropriate requested funds. In challenging the plaintiff's *prima facie* showing of callous indifference, however, an individual defendant certainly may present evidence of the limitations within which that

defendant attempted to perform his duties at Holman Prison. One such limitation may have been the funding available to comply with the constitutional norms. Because the element of callous indifference focuses on a defendant's intent, *see Fielder v. Bosshard*, 590 F.2d 105, 109 (5th Cir. 1979), if full compliance is beyond the control of a particular individual, and that individual can demonstrate that he accomplished what could be accomplished within the limits of his authority, then he cannot be said to have acted with callous indifference. *See Scheuer v. Rhodes*, 416 U.S. 232, 247, 94 S.Ct. 1683, 1691, 40 L.Ed.2d 90 (1974); *Slavin v. Curry*, 574 F.2d 1256, 1262 (5th Cir. 1978).

The issues raised in the present case are distinguishable from those raised in cases which generally adhere to the proposition that lack of funds is not a defense to a constitutional deprivation. This distinction lies in the difference between a suit for injunctive relief against a state and a suit for damages against an individual state employee. The assumption underlying rejection of the lack of funds defense is that a state is not required to operate a penitentiary system. If, however, a state chooses to operate a prison system, then each facili-

ty must be operated in a manner consistent with the constitution.[17] Thus, when a court is considering *injunctive* relief against the operation of an unconstitutionally cruel and unusual prison system, it should issue the injunction without regard to legislative financing. By such an injunction, however, the court does not order the prison to be operated; it merely enjoins its being operated in an unconstitutional manner. The state may undertake to operate its prison system in countenance with the constitution or it may choose to close it down. That choice is the state's and it is not dictated by the court. Accordingly, the State of Ala-

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17. Perhaps the best illustration of this assumption is the oft quoted statement:

> If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States.

Holt v. Sarver, 309 F.Supp. 362, 385 (E.D.Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) (quoted in *Gates v. Collier*, 501 F.2d 1291, 1320 (5th Cir. 1974), and *Pugh v. Locke*, 406 F.Supp. at 330–31.); *see also Inmates of Henry County Jail v. Parham*, 430 F.Supp. 304, 305 (N.D.Ga. 1976) ("Having freely, voluntarily and wisely chosen to own and operate a jail, the people and officials of Henry County have entered into a sphere of governmental action properly burdened with some special responsibilities.").

bama was precluded from pleading lack of funds as a defense to operating prisons in violation of the constitution. *Pugh v. Locke*, 406 F.Supp. at 330–31.

In contrast, however, we are called upon to consider the liability of individual state employees for injuries suffered as a result of the unconstitutional conditions. Unlike the state, an individual defendant generally has neither the power to operate nor close down a prison. Moreover, we refuse to adopt the position that an employee who attempts to accommodate the constitutional rights of prisoners in his charge, within the financial limitations imposed, should, instead, resign from his position because of the realization that full compliance is impossible in the absence of adequate funding. Indeed, the corrections official who walks away could be said to act with greater indifference than those who remain and attempt to work within the system.

In essence, the availability of funds, or lack thereof, is relevant in determining whether the individual is capable of committing the constitutional wrong alleged. Although each prison employee owes a duty to the inmates affected by his function, that duty must be measured by

the scope of his discretion and the extent of his authority. *See Procunier v. Navarette*, 434 U.S. 555, 561, 98 S.Ct. 855, 859, 55 L.Ed.2d 24 (1978) (quoting *Scheuer v. Rhodes*, 416 U.S. at 247–48, 94 S.Ct. at 1691–92.). For example, an individual defendant should be able to demonstrate that he had insufficient authority to correct the constitutional deficiencies in the prison. He also should be permitted to demonstrate that he did not have the resources necessary to correct that deficiency.

We are careful to note, however, that insufficient funds does not give rise to a separate defense. Evidence of the circumstances under which an individual defendant was required to perform his duties simply goes to the issue of callous indifference. To prove actionable conduct or callous indifference, Williams must demonstrate that a particular defendant had the capability (authority and means) to provide adequate security and did not do so. Stated another way, a defendant who was without the authority or means to provide the necessary security could rebut a charge of callous indifference.

B.

[25] Williams' second challenge to the district judge's instructions centers on the appropriate characterization of proximate cause. Rather than using the pattern instructions for proximate cause which had been requested by plaintiff,[18] the court instead referred to actions which "proximately caused or proximately contributed to the injury." The court's instruction, Williams claims, misled the jury by failing to draw

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18. Plaintiff's Requested Jury Instructions Nos. 25 and 26 are representative of the proximate cause instructions requested by Williams:

CONCURRING AND COMBINING CAUSES DEFINITIONS

The acts or failures to act of two or more persons may concur and combine to proximately cause injuries and damages. Causes 'concur and combine' when they join to produce a given result. Adopted from Alabama Pattern Jury Instructions, # 28–04.

CONCURRING AND COMBINING CAUSES OF DEFENDANTS

If you are reasonably satisfied from the evidence in this case that all of the defendants' acts or failures to act concurred and combined to proximately cause the injuries and damages claimed by the plaintiff, then each defendant is liable to the plaintiff. Adapted from Alabama Pattern Jury Instructions, # 28–05.

attention to the fact that two independent acts, namely the failure of prison officials to comply with the *Pugh* order plus Cook's independent act of assaulting Williams, could combine to produce injury, and each defendant would be equally responsible. In addition, he argues, the jury may have been led to believe defendants could not be liable if the state legislature contributed to Williams injury by failing to appropriate adequate funds.

Before evaluating Williams challenge, it is important to again note the two levels of causation and the effect of collateral estoppel. Williams must prove that each individual defendant proximately caused the unconstitutional conditions in the prison. Once this causal link is demonstrated his task is complete. Defendants are precluded from contending that the unconstitutional condition was not at least a proximate cause of Williams' injuries. *Supra*, part V, C. Nevertheless, in establishing the initial causal link, the proximate cause instruction of the district court remains crucial because the acts and omissions of many individuals may have combined to cause the unconstitutional conditions at Holman Prison.

Alabama law governs the definition of proximate cause in this case. *See* 42 U.S.C.

§ 1988. Accordingly, the instructions requested by Williams were adapted from Alabama Pattern Jury Instructions as approved by the Alabama Supreme Court. *See* Ala. Pattern Jury Instructions No. 28.04, 28.05, 28.06 (1973). Each instruction was designed to explain clearly the established law of proximate cause in Alabama that an individual may be liable even when he is not the sole cause of the injuries. *See Watkins v. United States*, 589 F.2d 214, 219 (5th Cir. 1979) (applying Alabama law); *Alabama Power Co. v. Taylor*, 293 Ala. 484, 498, 306 So.2d 236, 249 (1975); *Lawson v. General Telephone*, 289 Ala. 283, 289, 267 So.2d 132, 138 (1972); *Chambers v. Cox*, 222 Ala. 1, 3, 130 So. 416, 418 (1930).

The district court, however, refused to use the requested instructions and instead made abstract references to "proximate contribution." Although the record indicates that the court understood the nature of proximate causation,[19] we cannot say that its instructions clearly explained to the jury the meaning of concurring causes. Nor did the court recognize the two levels of causation and the effect of collateral estoppel. For these reasons, its proximate

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19. *See* Record, at 1129–30.

cause instructions were inadequate. The better approach would have been to adapt the pattern instructions to level one causation by explaining concurring causes in terms of defendants' acts or omissions and the unconstitutional conditions at the prison.

C.

Williams also assigns as error the trial court's refusal to instruct the jury that he could recover nominal damages without proof of actual injury for the denial of an absolute constitutional right. *See Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) (nominal damages are recoverable for a denial of due process without proof of actual injury). He claims that an absolute constitutional right is involved because he asserts claims directly under the eighth and fourteenth amendments, as well as under the civil rights statutes. Accordingly, he claims two errors: first, that the court failed to instruct the jury on his alleged direct constitutional action, and second, that no reference was made to the possibility of nominal damages.

Williams' direct constitutional violation theory is premised on the implication of a

Bivins-type right of action under the eighth and fourteenth amendments of the Constitution. *Bivins v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Although the Supreme Court has implied a direct right of action under the eighth amendment against federal officials, *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980), a similar right of action should not be implied against state officials. When Congress has provided an adequate alternative remedial scheme, which is intended to be a substitute for direct recovery under the constitution, a *Bivens*-type action is inappropriate. *Id.* at 18–19, 100 S.Ct. at 1472; *Davis v. Passman*, 442 U.S. 228, 245, 99 S.Ct. 2264, 2277, 60 L.Ed.2d 846 (1979); *Bivins*, 403 U.S. at 397, 91 S.Ct. at 2005. In implying a direct right of action against federal officials in *Carlson*, the Court explained that the plaintiff's only alternative right of action, suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680(h), was intended to complement rather than replace a direct constitutional action. 446 U.S. at 19–23, 100 S.Ct. at 1472–74. In contrast, Williams' alternative remedy under section 1983 against the state officials provides an adequate substitute for direct action under the eighth and fourteenth amendments. *See Dean v. Glad-*

ney, 621 F.2d 1331, 1336–37 n. 14 (5th Cir. 1980), *cert. denied*, 450 U.S. 983, 101 S.Ct. 1521, 67 L.Ed.2d 819 (1981); *Hearth, Inc. v. Department of Public Welfare*, 617 F.2d 381, 382–83 (5th Cir. 1980). Because "the inquiry is whether Congress has created what it views as an equally effective remedial scheme," 446 U.S. at 22, 100 S.Ct. at 1474, we conclude that the effectiveness of Williams' claim under section 1983 precludes the implication of a direct constitutional action under the eighth and fourteenth amendments against state officials.[20]

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20. In *Carlson*, the Court articulated four reasons why the FTCA was an inadequate substitute for a direct constitutional action: ineffective deterrence, no provision for punitive damages, no provision for jury trials, and extensive reliance on non-uniform state law. 446 U.S. at 21–23, 100 S.Ct. at 1473–74. Actions brought under § 1983, on the other hand, permit suits directly against state officials in both their individual and official capacities and generally allow for punitive damages and jury trials. In addition, a plaintiff acting under § 1983 can rely on federal law at least insofar as defining the required constitutional deprivation. *See* 42 U.S.C. § 1988 (1976) (state law will be applied only insofar as it is not inconsistent with the Constitution and laws of the United States). The similarity between a direct constitutional claim and a suit under § 1983 also is evident

[footnote continued]

The trial court therefore correctly refused to instruct the jury on this claim.

Similarly we find Williams' claim for nominal damages to be without merit and his reliance on *Carey v. Piphus, supra* misplaced. *Carey* stands for the proposition that once a plaintiff has successfully maintained a cause of action for a deprivation of constitutional due process, then nominal damages may be recovered in the absence of proof of actual injury. *See* 435 U.S. at 266, 98 S.Ct. at 1053. The problem in *Carey* was that plaintiffs had suffered a constitutional deprivation, but could not demonstrate actual injury from that deprivation. Williams, on the other hand, clearly has suffered actual injury which is attributable to the unconstitutional conditions at Holman Prison. His difficulty is in attaching individual responsibility for that deprivation. In the absence of individual responsibility, even nominal damages are not recov-

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from a defendant's perspective because both allow for a good faith defense. *Compare Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (good faith immunity for state officials) *with Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) (good faith immunity for federal officials).

erable. *Cf. Familias Unidas v. Briscoe*, 619 F.2d 391, 402–03 (5th Cir. 1980) (a good faith defense will defeat a claim for nominal damages). If the requirements of individual callous indifference and causation are satisfied, then the issue of damage liability arises. At that stage of the litigation Williams can introduce evidence of his actual injuries in lieu of any claim for nominal damages.

D.

Finally, included in the district judge's instructions was a statement that the State of Alabama could not be compelled to pay money judgments against officials sued in their individual capacity:

> There are now eight defendants who are sued as individuals in this lawsuit. Neither the State of Alabama nor the Board of Corrections is, itself, a party. These defendants were originally sued in their official as well as their individual capacities. The Court dismissed them in their official capacities because any damages awarded against them in their official capacities would have been against the state, and the state cannot be ordered to pay damages in such a case. Therefore, the defendants remain in this case

> solely in their individual capacities, and any damages awarded are against them as individuals, and the state cannot be required by law to pay such damages.

Record, at 1232. Not only was this statement irrelevant to the issues of liability and damages, *see* Fed.R.Evid. 411 (excluding evidence of liability insurance), but in light of section 41–9–74 of the Alabama Code,[21] which directs the Board of Adjustments to pay up to $100,000 to satisfy final judgments against corrections officials, it may well have been erroneous.

The existence of a collateral source of revenue to pay a judgment generally is excluded from evidence on two grounds. First, it simply has no bearing on the fault of a defendant. *See* 10 J. Moore, *Moore's Federal Practice* § 411.03. But more significantly, the absence or presence of a collateral source may induce a jury to decide a case on improper grounds. Advisory Committee's Note to Fed.R.Evid. 411. For example, if the court had informed the jury of the existence of section 41–9–74, the jury may have been more likely to hold defendants liable, believing that some of the loss

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21. *Supra* note 6.

would be paid by the state. *See Posttape Associates v. Eastman Kodak Co.*, 537 F.2d 751, 758 (3d Cir. 1976). On the other hand, the court's explicit statement that the state could not be required to pay may have created undue sympathy for defendants to the prejudice of Williams. *See* Fed.R.Evid. 403. Accordingly, we find that the instruction suggesting that the state could not be required to pay any part of the judgment against the defendant officials and employees sufficiently prejudiced Williams as to warrant reversal. The Court should have remained silent on the issue.

VII DIRECTED VERDICT

Williams final objection questions the propriety of the directed verdict entered in favor of defendants Raines and Chancery. Chancery was captain of the guard, but was not at the prison at the time of the assault. Raines, who normally was an assistant captain of the guard, was acting captain the day of the assault and was the first guard to arrive at the scene of the attack. We reverse the court's direction of a verdict to the extent that the liability of these two defendants should be reappraised in light of applicable principles set forth above.

For these reasons we REVERSE and REMAND this case for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 81-7037

D.C. Docket No. 79-5-N

BOBBY WILLIAMS,

Plaintiff-Appellant,

versus

LARRY BENNETT, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

Before HILL and HATCHETT, Circuit Judges, and GOLDBERG*, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby REVERSED; and that this cause be, and the same is hereby REMANDED to said District Court in accordance with the opinion of this Court;

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*Honorable Irving L. Goldberg, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

October 29, 1982

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7037

BOBBY WILLIAMS,

Plaintiff-Appellant,

versus

LARRY BENNETT, et al.,

Defendants-Appellees.

[Filed DEC 20 1982]

Appeal from the United States District Court
for the Middle District of Alabama

ON PETITION FOR REHEARING
(December 20, 1982)

Before Judges HILL, HATCHETT, Circuit Judges, and Judge GOLDBERG, Senior Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT

/s/ James C. Hill
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7037

BOBBY WILLIAMS,

Plaintiff-Appellant,

v.

LARRY BENNETT, ET AL.,
Defendants-Appellees.

[Filed FEB 16 1983]

Appeal from the United States District Court
for the Middle District of Alabama

ORDER

The court filed its opinion on October 29, 1982. Twenty days later, Defendants filed their petition for rehearing pursuant to Local Rule 26(b). The court denied the petition on December 20, 1982 but due to a clerical error, did not serve defendants' counsel with a copy of the order. The court then issued its mandate on January 14, 1983. In order to prevent injustice and to put the parties in the same position in which they would have been had counsel been properly notified, we recall the mandate. Local Rule 27(b). On motion of counsel, we also hereby stay the mandate for fifty-one (51) days in accordance with Federal Rule of Appellate Procedure 41 pending application to the Supreme Court for a writ of certiorari.

/s/James C. Hill
UNITED STATES CIRCUIT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 79-5-N

[Filed Dec 9 1980]

BOBBY WILLIAMS,
Plaintiff,

vs.

LARRY BENNETT; JOHN E. VICKERS; DR. MARION CARROLL; DR. THOMAS F. STATON; J. LOUIS WILKINSON; W.S. HAMNER; JOE OLIVER; and JUDSON C. LOCKE, JR.

Defendants.

JUDGMENT

On December 8, 1980, after this cause had been submitted to a jury, a verdict was returned by said jury as follows:

> "We, the Jury, find the issues in favor of the defendants Larry Bennett; John E. Vickers; Dr. Marion Carroll; Dr. Thomas F. Staton; J. Louis Wilkinson; W.S. Hamner; Joe Oliver; and Judson C. Locke, Jr.
>
> This the 8 day of December, 1980.
>
> /s/ Marie Johnson
> Foreperson"

It is, therefore, the ORDER, JUDGMENT and DECREE of this Court that the plaintiff take nothing by his complaint and that the defendants Larry Bennett, John E. Vickers, Dr. Marion Carroll, Dr. Thomas F. Staton, J.

Louis Wilkinson, W.S. Hamner, Joe Oliver and Judson C. Locke, Jr., have judgment on the verdict against the plaintiff.

The Court granted plaintiff's motion to proceed in forma pauperis in this cause on November 28, 1980; consequently, no costs are assessed in this action.

DONE this the 9th day of December, 1980.

/s/ Truman Hobbs
UNITED STATES DISTRICT JUDGE

APPENDIX F

[438 US 781]

STATE OF ALABAMA et al., Petitioners,

v

JERRY LEE PUGH et al.

438 US 781, 57 L Ed 2d 1114, 98 S Ct 3057

[No. 77-1107]

Decided July 3, 1978.

SUMMARY

Inmates and former inmates of the Alabama prison system sued the state of Alabama and the Alabama Board of Corrections, as well as a number of Alabama prison officials, alleging that conditions in Alabama prisons constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The United States District Court for the Middle District of Alabama agreed, and issued an order proscribing measures designed to eradicate cruel and unusual punishment in the system (406 F Supp 318). The United States Court of Appeals for the Fifth Circuit affirmed, but modified some aspects of the order (559 F2d 283).

Granting certiorari, the United States Supreme Court remanded the case to the Court of Appeals with instructions to order the dismissal of Alabama and the Board of Corrections from the action. In a per curiam opinion, expressing the views of BURGER, Ch. J., and BRENNAN, STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ., it was held that the suit against Alabama and the Board of Corrections was barred by the Eleventh Amendment, since Alabama had not consented (and under the Alabama Constitution, could not consent) to the filing of such a suit.

BRENNAN and MARSHALL, JJ., dissented.

STEVENS, J., dissenting, stated that the inclusion of Alabama and the Board of Corrections as defendants was harmless error not justifying the exercise of the Supreme Court's certiorari jurisdiction.

Briefs of Counsel, p 1344, infra.

OPINION OF THE COURT

[438 US 781]

Per Curiam.

[1] Respondents, inmates or former inmates of the Alabama prison system, sued petitioners, who include the State of Alabama and the Alabama Board of Corrections as well as a number of Alabama officials responsible for the administration of its prisons, alleging that conditions in Alabama prisons constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The United States District Court agreed and issued an order prescribing measures designed to eradicate cruel and unusual punishment in the Alabama prison system. The Court of Appeals for the Fifth Circuit affirmed but modified some aspects of the order which it believed exceeded the limits of the appropriate exercise of the court's remedial powers. 559 F2d 283.

[2a] Among the claims raised here by petitioners is that the issuance of

a mandatory injunction against the State of Alabama and the Alabama Board of Corrections is unconstitutional because the Eleventh Amendment prohibits federal courts from entertaining suits by private parties against States and their agencies. The Court of Appeals did not address this contention, perhaps because it was of the view that in light of

[438 US 782]

the numerous individual defendants in the case dismissal as to these two defendants would not affect the scope of the injunction. There can be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit. Edelman v Jordan, 415 US 651, 39 L Ed 2d 662, 94 S Ct 1347 (1974); Ford Motor Co. v Department of Treasury, 323 US 459, 89 L Ed 389, 65 S Ct 347 (1945); Worcester County Trust Co. v Riley, 302 US 292, 82 L Ed 268, 58 S Ct 185 (1937). Respondents do not contend that Alabama has consented to this suit, and it appears that no consent could be

given under Art 1, § 14, of the Alabama Constitution, which provides that "the State of Alabama shall never be made a defendant in any court of law or equity." Moreover, the question of the State's Eleventh Amendment immunity is not merely academic. Alabama has an interest in being dismissed from this action in order to eliminate the danger of being held in contempt if it should fail to comply with the mandatory injunction.[1] Consequently, we grant the petition for certiorari limited to Question 2 presented by petitioners,[2] reverse the judgment in part, and remand the case to the Court of

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1. **[2b]** Respondents contend that petitioners failed to raise the Eleventh Amendment issue in the District Court. The Court held in Edelman v Jordan, 415 US 651, 678, 39 L Ed 2d 662, 94 S Ct 1347 (1974), however, that "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court . . . ."

2. "Whether the mandatory injunction issued against the State of Alabama and the Alabama Board of Corrections violates the State's Eleventh Amendment immunity or exceeds the jurisdiction granted federal courts by 42 USC § 1983 [42 USCS § 1983]."

Appeals with instructions to order the dismissal of the State of Alabama and the Alabama Board of Corrections from this action.

So ordered.

Mr. Justice **Brennan** and Mr. Justice **Marshall** dissent.

SEPARATE OPINION

[438 US 783]

Mr. Justice Stevens, dissenting.

This Court is much too busy to spend its time correcting narmless errors. Nothing more is accomplished by the summary action it takes today.*

The Court does not question the propriety of the injunctive relief en-

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* Surely the Court does not intend to resolve summarily the issue debated by my Brothers in their separate opinions in Hutto v Finney, 437 US 678, 700, 57 L Ed 2d 522, 98 S Ct 2565 (Brennan J., concurring), and 708–710 n 6, 57 L Ed 2d 522 (Powell, J., concurring in part and dissenting in part).

tered by the District Court and upheld by the Court of Appeals. Striking the State's name from the list of parties will have no impact on the effectiveness of that relief. If the state officers disobey the injunction, financial penalties may be imposed on the responsible state agencies. Hutto v Finney, 437 US 678, 57 L Ed 2d 522, 98 S Ct 2565. The District Court's asserted error did not trouble the Court of Appeals because it has no practical significance. It does not justify the exercise of this Court's certiorari jurisdiction. I respectfully dissent.

APPENDIX G

N. H. NEWMAN et al.,
Plaintiffs-Appellees,

v.

STATE OF ALABAMA et al.,
Defendants-Appellants.

Jerry Lee PUGH, for himself and others similarly situated,
Plaintiffs-Appellees,

v.

Judson C. LOCKE, Jr. and State of Alabama, et al.,
Defendants-Appellants.

Worley JAMES et al.,
Plaintiffs-Appellees,

v.

George C. WALLACE et al.,
Defendants-Appellants.

No. 76–2269.

United States Court of Appeals,
Fifth Circuit.

Sept. 16, 1977.

Consolidated actions were filed by inmates of Alabama penal institution for

declaratory and injunctive relief in respect to alleged deprivations of their Eighth and Fourteenth Amendment rights. The United States District Court for the Middle District of Alabama, at Montgomery, Frank M. Johnson, Jr., J., 406 F.Supp. 318, entered judgment for plaintiffs, and defendants appealed. The Court of Appeals, Coleman, Circuit Judge, held that: (1) although, in respect to steps taken by the district court to insure reasonably adequate food, clothing, shelter, sanitation, necessary medical attention, and personal safety for Alabama state prisoners, some of the steps taken in regard to those matters, if considered in isolation, may have gone beyond constitutional mandates, they were nevertheless justifiably invoked for the eradication of Eighth Amendment prison conditions; (2) unless intended to apply only to existing facilities, no constitutional basis could be discerned for the requirement that Alabama state prisoners be housed in individual cells, nor could the Court of Appeals agree that "design" standards, without more, amount to a per se constitutional limitation on the number of prisoners which may be housed in a particular prison fa-

cility; (3) while the district court was entitled to take appropriate steps to insure compliance with its remedial decree pertaining to unconstitutional conditions in Alabama state prisons, its establishment and appointment of a human rights committee would not be approved; rather, a more reasonable, less intrusive, and more effective approach would have been to name one monitor for each of the prisons involved, with full authority to observe and to report its observations to the court, with no authority to intervene in daily prison operations; (4) failure of prison authorities to provide a rehabilitation program, by itself, does not constitute cruel and inhuman punishment, and (5) a state has no Eighth Amendment obligation to provide prisoners with opportunities to obtain a basic education, to attend vocational school, and to attend a transitional program prior to release.

Affirmed and remanded.

Appeals from the United States District Court for the Middle District of Alabama.

Before COLEMAN, Circuit Judge, KUNZIG *, Judge, and GEE, Circuit Judge.

COLEMAN, Circuit Judge.

The Eighth Amendment to the Constitution of the United States, reinforced by the Fourteenth Amendment, prohibits the imposition of cruel and unusual punishment. It is much too late in the day for states and prison authorities to think that they may withhold from prisoners the basic necessities of life, which include reasonably adequate food, clothing shelter, sanitation, and necessary medical attention, *Gates v. Collier*, 5 Cir., 1974, 501 F.2d 1291; *Newman v. Alabama*, 5 Cir., 1974, 503 F.2d 1320, *cert. denied* 421 U.S. 948, 95 S.Ct. 1680, 44 L.Ed.2d 102; *Williams v. Edwards*, 5 Cir., 1977, 547 F.2d 1206.

It should not need repeating that compliance with constitutional standards may not be frustrated by legislative inaction or failure to provide the necessary funds, *Gates v. Collier, supra*, at 1319; *Smith v. Sullivan*, 5 Cir., 1977, 553 F.2d 373.

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* Judge of the United States Court of Claims, sitting by designation.

On the other hand, lawful incarceration necessitates withdrawal of or limitations upon many individual privileges and rights. A prisoner does not retain constitutional rights that are inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Wide ranging deference must be accorded the decisions of prison administrators. They, and not the courts, must be permitted to make difficult judgments concerning prison operations, *Jones v. North Carolina Prisoners' Labor Union, Inc.* [1977], —— U.S. ——, 97 S.Ct. 2532, 53 L.Ed.2d ——. In his concurring opinion in *Jones*, Mr. Chief Justice Berger wrote that in penal matters the federal courts may not "second guess" legislatures and prison administrators except in the most extraordinary circumstances.

The present case is somewhat similar to *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561. There petitioners claimed that the judgment of the District Court represented an unwarranted intrusion by the federal judiciary into the discretionary authority committed to them by state and local law to perform their official functions. The Supreme Court found itself "substantially in agreement with th(*o*)se claims", at 366,

96 S.Ct. at 602. The case involved an "assertedly pervasive pattern of illegal and unconstitutional mistreatment by police officers".

The Supreme Court said,

> "Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law'. * * * Even in an action between private individuals, it has long been held that an injunction is 'to be used sparingly, and only in a clear and plain case'."

The Court concluded that when the District Court injected itself into the internal disciplinary affairs of the Philadelphia Police Department, a state agency, it had departed from the controlling precepts of federalism in determining the availability and scope of equitable relief. The judgment of the Court of Appeals affirming the decree of the District Court which directed the imposition of a comprehensive program for dealing adequately with civilian complaints was reversed.

This does not mean that Constitutional standards are not to be scrupulously ob-

served or that the statutes designed to enforce that objective are to be denied full effect. It does mean in the prison context that federal courts should keep their eyes on the main objective, the Eighth Amendment command for the eradication of cruel and unusual punishment. The remedy must be designed to accomplish that goal, not to exercise judicial power for the attainment of what we as individuals might like to see accomplished in the way of ideal prison conditions. There are those who would argue that imprisonment in any form is cruel and unusual. The Amendment, however, recognizes the right to punish for criminal conduct as long as that punishment does not escalate to the cruel and unusual.

For example, we have held that visitation privileges are matters subject to the discretion of prison officials, *McCray v. Sullivan*, 5 Cir., 1975, 509 F.2d 1332, 1334.

Failure of prison authorities to provide a rehabilitation program does not by itself constitute cruel and unusual punishment, *Ibid*, at 1335.

Federal courts are extremely reluctant to limit the freedom of prison officials to classify prisoners as they, in

their broad discretion, may deem appropriate, *Ibid*, at 1334; *Young v. Wainwright*, 5 Cir., 1971, 449 F.2d 338.

State penitentiaries are occupied by convicted felons, either ineligible for or found to be unworthy of probation. By its very nature, the operation of such a prison is a dangerous undertaking. Time and time again, experience has dramatically taught that the management and control of prisons, the prevention of mass violence within prisons, and the safe retention of convicts within prison walls, present problems of the first magnitude, in which failures occur all too often, as recently demonstrated at Brushy Mountain, Tennessee. There was intense nationwide interest when a notorious prisoner escaped but not much concern had previously been shown for the problems of prison officials in trying to hold him inside the walls.

The authority to manage and control a felony prison should never be unduly restricted or divided. That authority must repose in one well identified place, limited only by the requirements of the law.

I

This appeal is concerned with the remedies prescribed by the very able District Court for the eradication of cruel and unusual punishment in the Alabama State Prison System, *Pugh v. Locke*, 406 F.Supp. 318 (M.D.Ala., 1976). At the federal level this involves a comparatively new field of the law. It was not until 1962 that the Supreme Court applied the Eighth Amendment ban to the states through the Fourteenth Amendment, *Robinson v. State of California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758.

The State concedes that the evidence established excessive overcrowding in these prisons, that there were not sufficient guards to reasonably protect the inmates from one another, and that the overcrowding was primarily responsible for and exacerbated all the other ills of the penal system. As detailed in its published opinion, other indefensible conditions were found by the District Court, findings clearly supported by the evidence.

At the outset, then, the case is reduced to a constitutional appraisal of the remedies required of the State. The State contends that in fashioning those reme-

dies the District Court "exceeded its judicial power and abused its discretion".

[8] Our first response is that the determined efforts of the highly dedicated District Judge to put an end to unconstitutional conditions in the Alabama prison system merit high commendation. We cannot believe that the good people of a great state approved the prison situation demonstrated by the evidence in this case. We note, too, that for more than a year funds for an entirely new prison have been available as the result of legislative action, which is likewise commended. A state has no higher duty than the preservation of its governmental integrity by the enforcement of its own laws, which inescapably includes the maintenance of an effective state prison system. This Court expresses the hope that the difficulties encountered in naming a location for the new prison will be speedily resolved.

Our real issue is whether in striving to attain constitutional objectives the District Court in a few respects went impermissibly beyond the requirements of the federal constitution; more specifically, did the Court supersede the duly constituted state authorities in the performance of vital state functions rather

than *compelling* those authorities to perform those functions in a constitutional manner? We all understand, of course, that federal courts have no authority to address state officials out of office or to fire state employees or to take over the performance of their functions. Most assuredly, however, in proper cases a federal court can, and must, compel state officials or employees to perform their official duties in compliance with the Constitution of the United States.

At the outset we hold that the steps taken by the District Court to ensure reasonably adequate food, clothing, shelter, sanitation, necessary medical attention, and personal safety for the prisoners were within its sound discretion and will not be disturbed on appeal. Some of the steps in regard to these matters, if considered in isolation, may have gone beyond constitutional mandates but they were justifiably invoked for the eradication of Eighth Amendment conditions. We do not pause to discuss a number of state contentions which are foreclosed by our opinion in *Williams v. Edwards*, 5 Cir., 1977, 547 F.2d 1206, decided after this appeal was filed and briefed.

There are a few features of the case, however, in which we are of the opinion

that less intrusive, but equally effective, measures should have been taken by the District Court. An adjustment of these matters within constitutional bounds should not hamper or impede the attainment of an effective, constitutionally operated state penal system. As to these matters, we think some modifications are in order. With those modifications, the judgment of the District Court will be affirmed and the case remanded for further proceedings not inconsistent herewith.

II

Unless intended to apply only to existing facilities we do not discern the constitutional basis for the requirement that Alabama state prisoners shall be housed in individual cells, nor can we agree that "design" standards, *without more*, amount to a *per se* constitutional limitation on the number of prisoners which may be housed in a particular prison facility. Those who design prisons are not vested with either the duty or the power to prescribe constitutional standards as to prison space. Assuming that the District Court intended these limitations to apply only to presently existing prisons and not to those hereafter

to be constructed the judgment in these respects is affirmed.

The Court required that all new prison construction should provide sixty square feet of space per prisoner. We remand this requirement to the District Court for further consideration in the light of our opinion in *Williams v. Edwards*, 547 F.2d, at 1215.

III

The District Court established and appointed a "Human Rights Committee", composed of 39 individuals. Whether they were qualified by training or experience in the operation of a state prison system is not shown. At State expense, the Committee was authorized to employ a fulltime staff consultant, other specialists, and a fulltime clerk-stenographer. The Committee members were to be compensated at the same rate as that paid the Alabama State Board of Corrections.

The Committee was authorized to monitor implementation of the standards prescribed by the Court's decree as well as those prescribed in *Newman v. Alabama*.[1] The Order provided that

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1. D.C., 349 F.Supp. 278, *affirmed in part*, 5 Cir., 1974, 503 F.2d 1320, *cert. denied* 421 U.S. 948, 95 S.Ct. 1680, 44 L.Ed.2d 102.

> "[T]he Committee may at reasonable times inspect the state prison facilities, interview inmates, and inspect institutional records. The Committee shall review plans for implementation of this decree to ensure that they comport with minimum standards set forth. . . .. The Committee shall be authorized to take *any action* [emphasis added] reasonably necessary to accomplish its function."

Our initial reaction is that "reviewing plans for implementation of this decree to ensure that they comport with minimum standards set forth" could more properly have been assigned to the magistrate or to a master, qualified to hold hearings, make findings of fact, and report to the Court for its approval or disapproval. Moreover, the authority to "*take any action*", with no accompanying standards or limitations, could amount, in practical effect, to turning the administration of the prisons over to the Committee, as, in some respects, appears to have occurred.

It may be that in setting up the Committee the Court had in mind the appointment of numerous biracial committees in school desegregation cases. The analogy is not altogether inapposite but

we are not aware of any school desegregation decree in this Circuit which authorized such committees to do more than assemble information, confer, advise, and make representations to the school board and the court. They did not participate in "day to day" school operations, they received no compensation, and their function did not have either the appearance or the effect of superseding school boards or faculties in the daily administration of the school systems. Additionally, the circumstances surrounding the operation of schools are quite different to those prevailing in the operation of a penitentiary.

The State asserts, and it is not disputed, that in a number of instances prison authorities and their counsel were *not* notified of meetings between committee members and the District Court with reference to prison operations; therefore, state counsel were unable to participate or to be heard.

The State further asserts that the Committee impermissibly interfered with the Alabama Board of Corrections and its duly authorized agents in the exercise of powers and duties exclusively conferred upon them by Alabama law.

We have examined numerous letters appearing in the printed Appendix, signed by the Chairman of the 39 member Committee, addressed to the Alabama Board of Corrections or its agent, in which the addressees were directed to take specified action in regard to certain matters. These letters state that they were written at the direction of the District Court.

From the record, we are left with the firm conviction that the Committee undoubtedly did impermissibly intrude, and had every appearance of impermissibly intruding, upon functions properly belonging to the daily operation of the Alabama prison system. Prison officials cannot be expected to perform in an efficient or an effective manner if they are required to stay in line with so numerous a Committee, at the same time constantly confronted with the spectre of federal contempt of court.

[12] This is not to say that the District Court could not take and should not have taken appropriate steps to ensure compliance with its remedial decree. We think, however, that a more reasonable, less intrusive, more effective approach would have been to name one monitor for each of the prisons involved, with

full authority to *observe*, and to report his *observations* to the Court, with no authority to intervene in daily prison operations.

The use of a single monitor was the approach, not disapproved by this Court, in *Gates v. Collier, supra.*

The oversight of the proposed monitors might well be placed in the hands of a magistrate or a master, who could deal with alleged, but disputed, non-compliance in findings of fact and conclusions of law, subject to the ultimate decision of the District Judge, where appropriate.

By the single monitor method, the prison authorities will be diverted from the execution of their duties to the extent of conferring and cooperating with only one court-authorized individual. As a matter of fact, informal conferences between the warden and only one individual holding a charter from the Court would likely put an end to many problems without any necessity for further reference.

Such a monitor should be a person of undeniable qualifications, carefully chosen, hopefully with experience in the operation of a state or federal prison system which has not been in litigation over failure to abide by the Constitution.

Upon remand, and no later than thirty days from the receipt of our mandate, the District Court should dissolve the 39 member Committee and its functions should be terminated. The Court should name a monitor for each of the prisons which are the subject of the remedial decree. The guidelines for the monitors, and the duties of the prison authorities as to their cooperation with those monitors, should be specifically spelled out by an appropriate order so that none of those involved will suffer any reasonable doubt as to what is required of both monitors and prison officials.[2]

When so appointed, and their functions defined, the monitors may be paid reasonable compensation, consistently with their qualifications and experience, to be recovered from the State of Alabama as a part of the reasonable costs of this litigation.

Since the order appointing the 39 member Committee was not void *ab initio* the compensation and expense of its members and staff as heretofore fixed by the District Court will stand undisturbed, to be paid by the State as a part

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2. It may be that one monitor could adequately take care of more than one prison. If so, the District Court may act accordingly.

of the costs of this critically important litigation.

IV

Appellants complain vigorously of the actions of the District Court in assigning a major role in the classification of prisoners to the Prison Classification Project of the University of Alabama. In response to an inquiry propounded by this Court through appropriate judicial channels we are now in possession of an order entered by the District Court on July 19, 1977, in which the Court adjudged that the University of Alabama group is no longer functioning insofar as these cases are concerned. That being true, we find this aspect of the appeal to be moot. We make no comment thereon except to say that we understand the classification of prisons in the Alabama prison system will hereafter proceed under the control and direction of the duly constituted Alabama prison authorities, with no interference or participation by any outside group, saving, of course, the right of the District Court by appropriate measures, if needed, to see to it that constitutionally required classification standards, if any, are observed by the prison authorities in the exercise of a

function which is fundamentally theirs, *McCray v. Sullivan*, 5 Cir., 1975, 509 F.2d 1332.

V

[13] Failure of prison authorities to provide a rehabilitation program, by itself, does not constitute cruel and unusual punishment, *McCray v. Sullivan*, 5 Cir., 1975, 509 F.2d 1332, 1335.

[14, 15] Amicus Curiae, the United States, concedes that there is no constitutional right to rehabilitation for prisoners. It does proceed to argue, however, that "states have a duty to insure that the mental, physical, and emotional status of prisoners in their custody do not deteriorate". On the face of it, this is not a well considered statement. The mental, physical, and emotional status of individuals, whether in or out of custody, do deteriorate and there is no power on earth to prevent it. We think that what the government must have meant is that states may not inflict cruel and unusual punishment that would likely lead to such results. The briefs for the parties plaintiff and for the State of Alabama deal with this idea to considerable length. We decline to enter this uncharted bog. If the State furnishes its

prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety, so as to avoid the imposition of cruel and unusual punishment, that ends its obligations under Amendment Eight. The Constitution does not require that prisoners, as individuals or as a group, be provided with any and every amenity which some person may think is needed to avoid mental, physical, and emotional deterioration.

Even so, on the facts of this case, we affirm the actions of the District Court designed to provide Alabama prison inmates with reasonable recreational facilities. We do this simply because such facilities may play an important role in extirpating the effects of the conditions which undisputably prevailed in these prisons at the time the District Court entered its order.

VI

The District Court directed that inmates should be allowed to receive visitors on at least a weekly basis. Under our decision in *McCray v. Sullivan*, we feel that visitation regulations should be left to the prison authorities, wisely adapted to individual circumstances if their sound discretion should so dictate,

or included in general rules which will allow prisoners reasonable visitation.

[17] The Court further directed that visitors should not be "subjected to any unreasonable searches". Of course, no citizen not a prisoner may be subjected to unreasonable searches. Even so, within a prison the prime consideration is the preservation of the safety and security of the prison, including the exclusion of contraband. Prison authorities have both the right and the duty by all reasonable means to see to it that visitors are not smuggling weapons or other objects which could be used in an effort to escape or to harm other prisoners. They have a duty to intercept narcotics and other harmful contraband. This is no more an intrusion on the rights of visitors than the requirement that persons about to board commercial aircraft shall have their persons and baggage electronically searched for the purpose of determining that they are not carrying weapons, *United States v. Cyzewski*, 5 Cir., 1973, 484 F.2d 509, *cert. denied*, 415 U.S. 902, 94 S.Ct. 936, 39 L.Ed.2d 459. That which would be unreasonable in the outside world may be indispensable within a prison.

Additionally, we conclude that prison authorities should not be required to maintain prison security with one eye on the subject and the other on the consequences of contempt, in which the District Court could convert a warden into prisoner. If abuses actually exist, there are other remedies less likely to interfere with the ongoing safety of the prison.

Upon remand the District Court should eliminate this item from its decree, reserving the right to take the necessary action with reference to actual abuses if they persist to an extent justifying injunctive relief.

VII

The injunction included the Governor of Alabama. Our examination of the record indicates that he has no hand in the operations of the Alabama penal system beyond the customary budget recommendations to the legislature and the appointment of the Alabama Board of Corrections. The statute vests all power and control in the Board. Upon remand, the District Court should dissolve the injunction entered against the Governor. The same action should be taken as to those members of the Board and other prison officials who are no longer in of-

fice and thus have no further responsibility for the implementation of the Court decree. To the extent herein approved, the injunction will, of course, remain in full force and effect as to those actually running the system until such time as it may be shown in the District Court that the prisons are being operated in a constitutional manner. That the Court should remove itself from prison operations at the earliest date consistent with the vindication of constitutional rights is no doubt well known to the District Court.

VIII

The District Court directed that each prisoner shall be assigned to a meaningful job on the basis of his or her abilities and interests, and according to institutional needs. While there is no federal constitutional mandate for this proviso, as phrased it should not impose any real burden on the penitentiary authorities, so, in the context of this case we allow it to stand, not, however, to enjoy any precedential status in future cases if they should arise.

We interpret those portions of the Order dealing with opportunities to obtain a basic education, to attend vocational school, and to attend a transitional program prior to release as meaning that

if the prison authorities operate such programs each prisoner shall have impartially equal access on an objective standard of basic utility to the individual. We would find it difficult to hold, and we do not now hold, that if the state has no such programs it amounts to cruel and unusual punishment within the prohibitions of the Eighth Amendment. As a matter of fact, in the operation of a good prison system, we understand that such programs are fairly standard practices, instituted and operated on the initiative of state prison authorities.

Conclusion

With the modifications herein enumerated, the judgment of the District Court is affirmed. The case is remanded for further proceedings consistent herewith and for such other and further action as the District Court, pending the termination of this litigation, may find it necessary to take for the vindication of Eighth Amendment rights.

AFFIRMED and REMANDED.

APPENDIX H

[318] Jerry Lee PUGH, for himself and all others similarly situated, Plaintiffs,

v.

Judson C. LOCKE, Jr., individually and in his official capacity as Commissioner of the Alabama Board of Corrections, et al., Defendants.

WILCOX COUNTY COMMISSION, as the governing body of the County of Wilcox, State of Alabama, and all other counties similarly situated, and Association of County Commissions of Alabama, a voluntary association, Intervening Ancillary Plaintiffs,

v.

Melba Till ALLEN, individually and as State Treasurer, State of Alabama, et al., Ancillary Defendants,

Ira DeMent, United States Attorney, Amicus Curiae.

Worley JAMES et al., Plaintiffs,

v.

George C. WALLACE, individually and in his official capacity as Governor of Alabama, et al., Defendants.

WILCOX COUNTY COMMISSION, as the governing body of the County of Wilcox, State of Alabama, and all other counties similarly situated, and Association of County Commissions of Alabama, a voluntary association, Intervening Ancillary Plaintiffs,

v.

Melba Till ALLEN, individually and as State Treasurer, State of Alabama, et al., Ancillary Defendants,

The National Prison Project of the American Civil Liberties Union Foundation, Inc., and Ira DeMent, United States Attorney, Amici Curiae.

Civ. A. Nos. 74-203-N, 74-57-N.

United States District Court,
M. D. Alabama, N. D.

Jan. 13, 1976.

[321] MEMORANDUM OPINION

JOHNSON, Chief Judge.

In these consolidated class actions,[1] plaintiffs seek declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 for deprivation of their Eighth and Fourteenth Amendment rights. This Court has jurisdiction under 28 U.S.C. §§ 1343, 2201 and 2202. This Court, as authorized by Rule 52 of the Federal Rules of Civil Procedure, incorporates in this memorandum opinion the appropriate findings of fact and conclusions of law.

[1] The Court finds that these actions are maintainable as class actions under Federal Rule 23(a) and (b)(2). The class is composed of all persons presently confined by the Alabama Board of Corrections or who may be so confined in the future. The Court finds that the class is so numerous that joinder is impracticable; that the questions of law

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1. These class actions were consolidated on June 27, 1975, and tried together. Following trial of these cases, the pleadings in *Pugh* were amended to conform to the evidence, and the relief requested is now essentially identical to that requested in *James*. Consequently, this order will be entered in both cases. See Fed. R.Civ.P. 15(b).

and fact presented by the named plaintiffs are common to the class, as are the claims presented by the class representatives; and that the competent representation provided the named plaintiffs will adequately protect the interests of the class as a whole. The Court further finds that the defendants in both cases have acted and refused to act on grounds applicable to the class, for which both declaratory and injunctive relief are appropriate. The defendants, sued in their individual and official capacities, are the Governor of Alabama, the Commissioner of the Alabama Board of Corrections,[2] the Deputy Commissioner of the Alabama Board of Corrections, the members of the Board of Corrections, the Warden of Kilby Corrections Facility,[3] and the Warden of G. K. Fountain

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2. The original defendant, Commissioner L. B. Sullivan, left office during the pendency of these actions. His successor, Judson C. Locke, Jr., replaces Sullivan as a defendant. See Fed.R.Civ.P. 25(d).

3. Kilby Corrections Facility was formerly Mt. Meigs Medical and Diagnostic Center. The name of the institution was changed by Act of the Alabama Legislature during the pendency of these actions.

Correctional Center. The predecessors in office of these defendants, who were sued in their individual and official capacities, are retained as individual defendants. The Court has also had the able assistance of United States Attorney Ira DeMent and the American Civil Liberties Union National Prison Project, as amici curiae.

The complaint in *Pugh v. Locke* was originally filed by an inmate of G. K. Fountain Correctional Center on February 26, 1974. The amended complaint was filed by court-appointed counsel on April 16, 1974, seeking declaratory, in-
[322] junctive and monetary relief for the alleged failure of defendants to adequately protect the plaintiff class from violence on the part of other inmates. The complaint was filed on behalf of a class composed of all inmates of the state penal system who have been or may be confined to G. K. Fountain Correctional Center and who have been, are, or may be subjected to such violence. At the request of plaintiffs, the claims for monetary damages were severed by order of June 27, 1975. The action proceeded on the claims for declaratory and injunctive relief.

The original complaint in *James v. Wallace* was filed on June 21, 1974. An amended complaint was filed thereafter on July 29, 1974, by court-appointed counsel. That complaint, on behalf of all inmates incarcerated in state penal institutions, essentially alleges that defendants fail to provide adequate rehabilitation opportunities for inmates, maintain conditions in these institutions which make rehabilitation impossible, and provide the opportunities that do exist in an unequal manner—all in violation of plaintiffs' Eighth and Fourteenth Amendment rights.

After extensive pretrial discovery by parties and amici curiae, the cases were heard beginning August 20, 1975, in a trial that lasted seven days. Because many facts were stipulated, the evidence at the trial consisted largely of expert testimony. The cases are now submitted on evidence offered at trial, depositions, exhibits, photographs, briefs and over 1,000 stipulated facts. The trial concluded with the admission by defendants' lead counsel, in open court, that the evidence conclusively established aggravated and existing violations of plaintiffs' Eighth Amendment rights.

The Alabama Board of Corrections (hereinafter the Board) is charged with the responsibility for managing the state's penal institutions.[4] The Board currently operates four large institutions for male inmates—Holman Unit Prison, G. K. Fountain Correctional Center, Draper Correctional Center, and Kilby Corrections Facility. Kilby also contains the hospital facility for all state prisoners and the classification center for male inmates. The Board also maintains Julia Tutwiler Prison for women and the Frank Lee Youth Center for young men.[5] Additionally, there are six road camps, one pre-release center, and eight work-release centers. Currently the inmate population of these institutions is in excess of 5,000.

The four principal institutions are horrendously overcrowded. At the time of the trial of these cases the prison population in these four institutions was as follows:

4. Ala.Code tit. 45, §§ 3, 10(1) (1958).

5. To be eligible for assignment to Frank Lee Youth Center an inmate must be no more than 23 years old, must have a sentence of less than 10 years, must not have been convicted of a crime involving violence, and must have no history of drug abuse.

	Maximum Number for Which Designed	Number in Custody
Fountain	632	Over 1100
Holman	540	Over 750
Draper	632	Over 1000
Kilby	503	Over 700

The overcrowded condition of these institutions is the subject of another class action, *McCray v. Sullivan*, 399 F.Supp. 271 (S.D.Ala.1975). Following the close of evidence in the instant cases, a joint interim order was entered by this Court and the *McCray* court, enjoining the defendants from accepting any new prisoners, except escapees and parole violators, into these four institutions until the population in each is reduced to design capacity.[6] The purpose of that emergency order was to prevent aggravation of the conditions created by the grave Eighth Amendment violations.

The effects of severe overcrowding are heightened by the dormitory living ar-
[323] rangements which prevail in these institutions. Bunks often are packed together so closely that there is no walking space between them. Sanitation and se-

6. Order of August 29, 1975.

curity are impossible to maintain. There was testimony that the quarantine population at Kilby[7] is so crowded that inmates have to sleep on mattresses spread on floors in hallways and next to urinals. As will be noted, overcrowding is primarily responsible for and exacerbates all the other ills of Alabama's penal system.

The dilapidation of the physical facilities contributes to extremely unsanitary living conditions. Testimony demonstrated that windows are broken and unscreened, creating a serious problem with mosquitoes and flies. Old and filthy cotton mattresses lead to the spread of contagious diseases and body lice. Nearly all inmates' living quarters are inadequately heated and ventilated. The electrical systems are totally inadequate, exposed wiring poses a constant danger to the inmates, and insufficient lighting results in eye strain and fatigue.

In general, Alabama's penal institutions are filthy. There was repeated tes-

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7. Kilby is the receiving center for inmates being processed in and out of state prisons. New inmates are kept in quarantine for approximately six weeks. Kilby also maintains a permanent population of approximately 150.

timony at trial that they are overrun with roaches, flies, mosquitoes, and other vermin. A public health expert testified that he found roaches in all stages of development—a certain indicator of filthy conditions. This gross infestation is due in part to inadequate maintenance and housekeeping procedures, and in part to the physical structure of the buildings themselves. For example, floors in many shower rooms are so porous that it is impossible to keep them clean. Plumbing facilities are in an exceptional state of disrepair. In one area at Draper, housing well over 200 men, there is one functioning toilet. Many toilets will not flush and are overflowing. Some showers cannot be turned off and continually drip or even pour water. Frequently there is no hot running water for substantial periods of time. Witnesses repeatedly commented on the overpowering odor emanating from these facilities.

Personal hygiene is an insurmountable problem in these circumstances. The parties stipulated that the state supplies prisoners only with razor blades and soap. It was further stipulated that the state furnished no toothpaste, tooth-

brushes, shampoo, shaving cream, razors or combs; but that such items are available for those inmates who can afford them. Further, household cleaning supplies rarely are available for inmates to maintain their living areas.

Food service conditions are equally unsanitary. Food is improperly stored in dirty storage units, and is often infested with insects. Mechanical dishwashers are not adequately maintained and therefore do not even approach the minimum temperature required for proper sanitation. Moreover, food service personnel, many of whom are inmates, are often untrained and do not follow proper sanitation procedures in the handling and preparation of food. Inmates are not supplied with reasonable eating and drinking utensils; some inmates drink from used tin cans, and have to wash and save their own utensils from meal to meal. Garbage sits in large open drums throughout the dining halls. As a general rule, the food is unappetizing and unwholesome. Inmates with some source of funds may supplement their diets from the prison canteen, but the large majority must subsist only on what is supplied by the kitchen. One menu is

prepared for all inmates who require a special diet, regardless of whether it meets their particular needs.

One expert witness, a United States public health officer, toured facilities at Draper, Fountain, Holman, and Kilby. He testified at trial that he found these facilities wholly unfit for human habitation according to virtually every criteri-
[324] on used for evaluation by public health inspectors. With very few exceptions, his testimony was that, if such facilities were under his jurisdiction, he would recommend that they be closed and condemned as an imminent danger to the health of the individuals exposed to them. This Court credits this testimony and makes it a part of these findings.

There is no working classification system in the Alabama penal system, and the degree to which this impedes the attainment of any proper objectives of a penal system cannot be overstated. Although classification personnel throughout the state prisons have been attempting to implement a wholly new classification process established in January, 1975, understaffing and overcrowding have produced a total breakdown of that process. For no valid reason apparent

from the evidence, far too many inmates receive maximum security classifications under the present classification system. Moreover, during what is called the classification process, new inmates, who are already trying to adjust to the new environment of the prison, are restricted to the overcrowded living quarters and are permitted neither visitors nor recreation. Testing and evaluation of these individuals, essential to a working classification system, cannot be regarded as reliable or even useful when conducted under such traumatic and stressful conditions.

Prison officials do not dispute the evidence that most inmates are assigned to the various institutions, to particular dormitories, and to work assignments almost entirely on the basis of available space. Consequently, the appreciable percentage of inmates suffering from some mental disorder is unidentified, and the mentally disturbed are dispersed throughout the prison population without receiving treatment. This Court previously found in an Alabama prison system case that approximately 10 percent of the inmate population are psychotic, and that another 60 percent are

disturbed enough to require treatment.[8] The evidence in the instant cases clearly reflects that nothing has been done to alleviate this situation. Some of these inmates should, according to the undisputed evidence presented in these cases, be transferred to a facility for the criminally insane, and many others should be treated within the penal system. The evidence further reflects that there are also a number of mentally retarded inmates who need to be, according to any humanitarian concept, identified and placed in an appropriate environment. A 1972 study prepared by the University of Alabama Center for Correctional Psychology, under contract with the Board of Corrections, highlighted the woefully inadequate mental health program in Alabama prisons and suggested minimum standards. None of these recommended standards have been implemented. The findings and conclusions of that study are fully supported by the evidence in these cases.

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8. *Newman v. Alabama*, 349 F.Supp. 278 (M.D. Ala.1972), *aff'd in part* 503 F.2d 1320 (5th Cir. 1974), *cert. denied* 421 U.S. 948, 95 S.Ct. 1680, 44 L.Ed.2d 102 (1975).

Further effects of failure to classify are manifold. Violent inmates are not isolated from those who are young, passive, or weak. Consequently, the latter inmates are repeatedly victimized by those who are stronger and more aggressive. Testimony shows that robbery, rape, extortion, theft and assault are everyday occurrences among the general inmate population. Rather than face this constant danger, some inmates voluntarily subject themselves to the inhuman conditions of prison isolation cells.

Emotional and physical disabilities which require special attention pass unnoticed. There is no rational basis on which to assign inmates to the few vocational, educational and work opportunities which do exist. All of this contributes to the apathy, tension and frustration which pervade Alabama prisons.

The inmate population also contains a number of aged and infirm who are often housed in dormitories in which conditions are particularly hazardous. There
[325] are no special programs to meet the needs of these people and they are frequently unprotected from the general population. For example, in Draper such prisoners—some of them confined

to wheelchairs, others scarcely able to move without help—are left without supervision in second-floor quarters that are accessible only by stairway, with no means of evacuation in the event of fire or other physical emergency, and utterly helpless in the event of the sort of medical emergency to which the elderly are susceptible. In this idleness, filth and despair, the condition of these inmates can be expected only to deteriorate further.

Each of these failings in Alabama's penal system is compounded by that system's most pervasive and most obvious problem: the overcrowding with which all prisoners must live. Yet even if the inmate population were reduced to design capacity, the system would still be woefully understaffed. Former Commissioner Sullivan testified that the four large institutions alone need, at a minimum, 692 guards, but that they currently employ only 383. Guards rarely enter the cell blocks and dormitories, especially at night when their presence is most needed. The extremely high inmate-to-staff ratio makes personal interaction between the two virtually impossible be-

cause staff members must spend all their time attempting to maintain control or to protect themselves.

Another result of understaffing is that some inmates have been allowed to assume positions of authority and control over other inmates, creating opportunities for blackmail, bribery, and extortion. Some prisoners are used as "strikers" to guard other inmates on farm duty and as "cell flunkies" to maintain order and perform tasks for prison staff. They are afforded special privileges, including freedom to ignore prison regulations and to abuse other inmates. Inmate clerks have access to the institutional files and mail of other inmates; inmate medical aides are used to dispense some medication, which they may withhold at will.

The problems posed by understaffing are aggravated by the fact that most of the large institutions are located in rural areas of the state. The guards, drawn largely from the local population, are practically all white and rural in contrast to the predominantly black and urban inmate population they supervise. A number of witnesses testified that staff members address black inmates with racial slurs, further straining already tense relations.

In view of the foregoing, the rampant violence and jungle atmosphere existing throughout Alabama's penal institutions are .no surprise. The evidence reflects that most prisoners carry some form of homemade or contraband weapon, which they consider to be necessary for self-protection. Shakedowns to remove weapons are neither sufficiently thorough nor frequent enough to significantly reduce the number of weapons. There are too few guards to prevent outbreaks of violence, or even to stop those which occur.

While it is clear that violence is widespread, there are no accurate statistics on the incidence of violence. A cardinal precept of the convict culture is that no inmate should report another inmate to officials. This reluctance to report violence is compounded by the failure of prison officials to keep accurate records of violence which does come to their attention.

One 20-year-old inmate, after relating that he has been told by medical experts that he has the mind of a five year old, testified that he was raped by a group of inmates on the first night he spent in an Alabama prison. On the second night he

was almost strangled by two other inmates who decided instead that they could use him to make a profit, selling his body to other inmates.

An inmate required to live in these circumstances stands no chance of leaving the institution with a more positive and constructive attitude than the one he or she brought in. The evidence reflects that even if rehabilitation programs, adequate in number and quality,
[326] were available, whatever benefit might be derived from them could be undone quickly by this inhumane environment. Consequently, this Court finds that these conditions create an environment in which it is impossible for inmates to rehabilitate themselves—or to preserve skills and constructive attitudes already possessed—even for those who are inclined to do so. Further, this Court finds that these conditions create an environment that not only makes it impossible for inmates to rehabilitate themselves but also makes dehabilitation inevitable.

Inmates are denied any meaningful opportunity to participate in vocational, educational or work activities. As a result, most inmates must spend substan-

tially all of their time crowded in dormitories in absolute idleness. Such unbroken inactivity increases boredom, tension and frustration, which in turn promote incidents of violence. The evidence reflects that idleness of this magnitude destroys any job skills and work habits inmates may have, and contributes to their mental and physical degeneration.

An examination of the very few rehabilitative programs which do exist reveals that they are totally inadequate to provide reasonable opportunities for rehabilitation—or even to prevent physical and mental deterioration—of most of the inmate population. It was stipulated that the average reading level of prisoners entering the penal system in the first quarter of the year 1975 was below the sixth grade level. Yet basic education classes are available to only a small number of inmates. For example, Holman Prison, with more than 750 inmates, offers Adult Basic Education for only 40 inmates at any one time. At Kilby, an inmate conducts that institution's only basic education class.

While the Board of Corrections has made some recent efforts to increase vocational training and work opportunities,

those programs are available to only a limited number of selected inmates. Eligibility requirements for most programs are quite restrictive.[9]

In light of the stipulation that 59 percent of Alabama's state prisoners are unskilled—and that another 5.5 percent claim no occupation—it is clear that access to existing programs for these prisoners who need vocational training is minimal. For those few inmates who qualify, the range of occupations and trades offered is extremely limited.

The Board offers an acceptable rehabilitation opportunity to a limited number of inmates through one pre-release center and eight work-release centers. In addition to providing job skills, the programs allow prisoners to gradually re-enter the community and to save some money, up to 75 percent of their salaries, prior to release. Again, there are stringent eligibility requirements for the few openings in these programs.

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9. For example, for entry into many programs an inmate must have no disciplinary violations for six months prior to enrollment, must have no holdovers, must have a regular duty assignment, must not be considered a security risk, and must be within 18 months of his or her release date upon completion of the course.

The single exception to the dearth of rehabilitation programs is the Frank Lee Youth Center. However, that institution houses approximately 200 selected inmates who meet strict objective and subjective criteria.[10] Most inmates at Frank Lee can expect to participate in a number of educational, vocational and recreational activities. To date the inmate population at Frank Lee has been over 50 percent white in contrast to the predominantly black populations at other state penal institutions.

Institutional work assignments offer little to motivate inmates. There are too few jobs and most take only a few hours to perform. Frequently many more inmates are assigned to a particular job
[327] than are required to accomplish it. Prisoners work for no pay and at jobs which do not teach usable skills. Inmates at Fountain and Holman, most of whom intend to return to metropolitan areas upon release, are routinely assigned to farm labor. Fountain operates a license

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10. See note 5 *supra*. The Director of the Frank Lee Youth Center, William Gilmore, testified that he relied on his own subjective evaluation, as well as the criteria outlined in note 5, in selecting inmates.

tag plant, and Draper has a mattress factory. Neither of these programs is available to any significant number of inmates. Other inmates who have an assigned task perform housekeeping functions for the institution. As observed, the lack of meaningful work opportunities contributes to idleness, boredom, apathy and frustration.

The flow of money through Alabama prisons is for all practical purposes uncontrolled. Each prisoner receives 25 cents per week from the state, as well as postage and paper for one letter each week. There are almost no legitimate means for an inmate to earn money. Some prisoners receive substantial sums from outside sources and through contraband activities. Money is required to buy personal hygiene items, food to supplement the prison diet, and postage. Money can also buy drugs, alcohol, changes in institutional records, special privileges, sex, and housekeeping favors. Interest collected on loans made by inmates with money is exorbitant, and may be collected in a ruthless manner. Gambling, smuggling, and extortion are several of the abuses fueled by the failure of prison officials to control the pos-

session of currency inside the institution. Finally, many prisoners must make the difficult transition from prison life on the pittance the state provides them upon release.[11]

There is no organized recreation program for Alabama's prisons. While some athletic facilities and equipment are available, they are not properly maintained. Almost no provision is made for inmates to participate in hobbies. Consequently, inmates have little to occupy the inordinate amount of free time they must fill.

The chances of successful rehabilitation or the chances of escaping mental and physical degeneration are also diminished by the fact that prison environment is much different from that in the society to which an inmate must return.

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11. The state is required by statute to provide an inmate, upon release, with "a decent suit of clothes and with the least expensive mode of public transportation back to the point of sentencing . . . ." Ala.Code tit. 45 § 54 (Supp.1973). The state also provides ten dollars in cash to all inmates serving five years or less, and an additional two dollars per year for each additional year served. Ala.Code tit. 45 § 55 (1958).

Current visitation policies discourage visits—which are essential to the maintenance of community ties—and therefore decrease an inmate's chances of successful reintegration upon release. Some institutions allow visitors only on alternate Sundays, while inmates in quarantine at Kilby are permitted no visitors. Visiting areas are overcrowded and uncomfortable, allow no privacy, and prohibit physical contact in some instances. Public transportation to institutions located in remote areas of the state is infrequent and too expensive for many people to use regularly.

An oral order enjoining the use of isolation and segregation cells which do not meet minimum standards was issued by the Court at the conclusion of the trial in these cases. The indescribable conditions in the isolation cells required immediate action to protect inmates from any further torture by confinement in those cells. As many as six inmates were packed in four foot by eight foot cells with no beds, no lights, no running water, and a hole in the floor for a toilet which could only be flushed from the outside. The infamous Draper "dog-house" is a separate building, locked

from the outside, with no guard stationed inside. Inmates in punitive isolation received only one meal per day, frequently without utensils. They were permitted no exercise or reading material and could shower only every 11 days. Punitive isolation has been used to punish inmates for offenses ranging from
[328] swearing at guards and failing to report to work on time, to murder.

[2, 3] In light of the foregoing facts, this Court has a clear duty to require the defendants in these cases to remedy the massive constitutional infirmities which plague Alabama's prisons. It is with great reluctance that federal courts intervene in the day-to-day operation of state penal systems, *Procunier v. Martinez*, 416 U.S. 396, 404–05, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974); *Cruz v. Beto*, 405 U.S. 319, 321, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972); *Novak v. Beto*, 453 F.2d 661, 671 (5th Cir. 1971); *Diamond v. Thompson*, 364 F.Supp. 659, 662 (M.D.Ala.1973), a function they are increasingly required to perform.[12] While this Court continues

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12. Federal courts in a number of states including Massachusetts, *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F.Supp. 676 (D.Mass.

[footnote continued]

to recognize the broad discretion required for prison officials to maintain orderly and secure institutions, *Procunier v. Martinez,* 416 U.S. at 404–05, 94 S.Ct. 1800; *Diamond v. Thompson,* 364 F.Supp. 659 (M.D.Ala.1973); *Newman v. Alabama,* 349 F.Supp. 278 (M.D.Ala. 1972), *aff'd in part* 503 F.2d 1320 (5th Cir. 1974), *cert. denied* 421 U.S. 948, 95 S.Ct. 1680, 44 L.Ed.2d 102 (1975), constitutional deprivations of the magnitude

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1973), *aff'd* 494 F.2d 1196 (1st Cir. 1974); Maryland, *Collins v. Schoonfield,* 344 F.Supp. 257 (D.Md.1972); Arkansas, *Holt v. Sarver,* 309 F.Supp. 362 (E.D.Ark.1970), *aff'd* 442 F.2d 304 (8th Cir. 1971); and Mississippi, *Gates v. Collier,* 349 F.Supp. 881 (N.D.Miss.1972), *aff'd* 501 F.2d 1291 (5th Cir. 1974), recently have had occasion to hold conditions in penal institutions in those states unconstitutional. In Alabama, this Court in previous cases has addressed the issues of inadequate medical care, *Newman v. Alabama,* 349 F.Supp. 278 (M.D. Ala.1972), *aff'd in part* 503 F.2d 1320 (5th Cir. 1974), *cert. denied* 421 U.S. 948, 95 S.Ct. 1680, 44 L.Ed.2d 102 (1975); and disciplinary procedures, *Diamond v. Thompson,* 364 F.Supp. 659 (M.D.Ala.1973), in the state's prisons. Federal courts in other districts of this state have found unconstitutional conditions in both state, *McCray v. Sullivan,* 399 F.Supp. 271 (S.D.Ala.1975), and local, *Thrasher v. Bailey,* CA 73P 816–S (N.D.Ala. Aug. 29, 1973), penal facilities.

presented here simply cannot be countenanced, and this Court is under a duty to, and will, intervene to protect incarcerated citizens from such wholesale infringements of their constitutional rights. See *Procunier v. Martinez,* 416 U.S. at 405–06, 94 S.Ct. 1800; *Johnson v. Avery,* 393 U.S. 483, 486, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969).

[4–7] Federal litigation by prisoners alleging systemic constitutional deficiencies has mushroomed in recent years. There has been growing recognition by the courts that prisoners retain all rights enjoyed by free citizens except those necessarily lost as an incident of confinement. See *Pell v. Procunier,* 417 U.S. 817, 822, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1973); *Jackson v. Godwin,* 400 F.2d 529, 532 (5th Cir. 1968); *Washington v. Lee,* 263 F.Supp. 327, 331 (M.D.Ala.1966), *aff'd per curiam,* 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968); *cf. Price v. Johnston,* 334 U.S. 266, 285, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948); *Gates v. Collier,* 501 F.2d 1291 (5th Cir. 1974). The Supreme Court recently identified three legitimate functions of a correctional system: deterrence, both specific and

general; rehabilitation; and institutional security. *Pell v. Procunier,* 417 U.S. at 822–23, 94 S.Ct. 2800. "It is in the light of these legitimate penal objectives that a court must assess challenges to prison regulations based on asserted constitutional rights of prisoners." *Id.* at 823, 94 S.Ct. at 2804. Therefore, when a prison policy advances one of these valid goals, the Court is required to weigh the competing interests of the prisoner and of the state in pursuing that goal. When an inmate is restricted in a manner which supports no such valid purpose, that restriction cannot stand.

[8–10] Prisoners are entitled to be free of conditions which constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The content of the Eighth Amendment is not static but "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles,* 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d
[329] 630 (1958). There can be no question that the present conditions of confinement in the Alabama penal system violate any current judicial definition of cruel and unusual punishment, a situa-

tion evidenced by the defendants' admission that serious Eighth Amendment violations exist.[13] In these circumstances, it is the very confinement itself which impermissibly contravenes the Eighth and Fourteenth Amendment rights of the plaintiff classes.

> [C]onfinement itself within a given institution may amount to a cruel and unusual punishment prohibited by the Constitution where the confinement is characterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people even though a particular inmate may never personally be subject to any disciplinary action.

Holt v. Sarver, 309 F.Supp. 362, 372–73 (E.D.Ark.1970), *aff'd* 442 F.2d 304 (8th Cir. 1971).

The conditions in which Alabama prisoners must live, as established by the evidence in these cases, bear no reasonable relationship to legitimate institution-

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13. Defendants through their lead counsel, the Honorable Robert S. Lamar, Jr., admitted in open court, at the close of trial, that plaintiffs had proved serious Eighth Amendment violations.

al goals. As a whole they create an atmosphere in which inmates are compelled to live in constant fear of violence, in imminent danger to their physical well-being, and without opportunity to seek a more promising future.

[11] The living conditions in Alabama prisons constitute cruel and unusual punishment. Specifically, lack of sanitation throughout the institutions—in living areas, infirmaries, and food service—presents an imminent danger to the health of each and every inmate. Prisoners suffer from further physical deterioration because there are no opportunities for exercise and recreation. Treatment for prisoners with physical or emotional problems is totally inadequate. This Court has previously ordered that the penal system provide reasonable medical care for inmates in these institutions on a finding that

> [f]ailure of the Board of Corrections to provide sufficient medical facilities and staff to afford inmates basic elements of adequate medical care constitutes a willful and intentional violation of the rights of prisoners guaranteed under the Eighth and Fourteenth Amendments.

Newman v. Alabama, 349 F.Supp. at 285–86. The evidence in these cases leads to the inescapable conclusion that the gross inadequacies in medical care found in that case have not been remedied.

[12] Prison officials are under a duty to provide inmates reasonable protection from constant threat of violence.

> While occasional, isolated attacks by one prisoner on another may not constitute cruel and unusual punishment, *Penn v. Oliver*, 351 F.Supp. 1292 (E.D. Va.1972), confinement in a prison where violence and terror reign is actionable. A prisoner has a right, secured by the eighth and fourteenth amendments, to be reasonably protected from constant threat of violence and sexual assault by his fellow inmates, and he need not wait until he is actually assaulted to obtain relief.

Woodhous v. Commonwealth of Virginia, 487 F.2d 889, 890 (4th Cir. 1973); see *Finney v. Arkansas Board of Corrections*, 505 F.2d 194, 201 (8th Cir. 1974); *Gates v. Collier*, 501 F.2d 1291, 1308–09 (5th Cir. 1974); *Holt v. Sarver*, 309 F.Supp. 362, 376–78, 381 (E.D.Ark. 1970), *aff'd* 442 F.2d 304 (8th Cir. 1971).

[13] The defendants in these cases have failed to carry out that duty. The evidence establishes that inmates are housed in virtually unguarded, overcrowded dormitories, with no realistic attempt by officials to separate violent, aggressive inmates from those who are passive or weak. The tension generated
[330] by idleness and deplorable living conditions contributes further to the ever-present threat of violence from which inmates have no refuge.

[14] The evidence in these cases also establishes that prison conditions are so debilitating that they necessarily deprive inmates of any opportunity to rehabilitate themselves, or even to maintain skills already possessed. While courts have thus far declined to elevate a positive rehabilitation program to the level of a constitutional right, it is clear that a penal system cannot be operated in such a manner that it impedes an inmate's ability to attempt rehabilitation, or simply to avoid physical, mental or social deterioration.

The absence of an affirmative program of training and rehabilitation may have constitutional significance where in the absence of such a pro-

> gram conditions and practices exist which actually militate against reform and rehabilitation.

Holt v. Sarver, 309 F.Supp. at 379.

[15] Not only is it cruel and unusual punishment to confine a person in an institution under circumstances which increase the likelihood of future confinement, but these same conditions defeat the goal of rehabilitation which prison officials have set for their institutions. See *James v. Wallace*, 382 F.Supp. 1177, 1180 n.4 (M.D.Ala.1974).

[16–18] Prisoners are protected by the Due Process and Equal Protection clauses of the Fourteenth Amendment, *Washington v. Lee*, *supra*; therefore, they must be free from arbitrary and capricious treatment by prison officials. *Sostre v. McGinnis*, 442 F.2d 178, 198–99 (2d Cir. 1971) (en banc), *cert. denied sub nom. Sostre v. Oswald*, 404 U.S. 1049, 92 S.Ct. 719, 30 L.Ed.2d 740 and *sub nom. Oswald v. Sostre*, 405 U.S. 978, 92 S.Ct. 1190, 31 L.Ed.2d 254 (1971); *Jackson v. Godwin*, 400 F.2d 529, 532 (5th Cir. 1968). There is evidence in these cases that the Alabama penal system makes available a very limited number of vocational, educational, and work opportunities. Open-

ings in whatever programs are offered must be assigned on a reasonable and rational basis. See *Thompson v. Gallagher*, 489 F.2d 443 (5th Cir. 1973). Currently, inmates are able to buy and sell desirable jobs. Moreover, while the prison system is entitled to make rational distinctions in making assignments, it is impossible to do so without a functioning classification system.

[19, 20] The inmates' ability to engage in rehabilitation is further frustrated by unreasonable restrictions on visitation from family and friends. Any restrictions imposed by the prisons' visitation policies must be reasonably related to a legitimate governmental interest. See *Thompson v. Gallagher*, *supra*. The visitation policies currently employed by Alabama penal institutions do not serve the valid penal objectives defined by the Supreme Court in *Pell v. Procunier*, 417 U.S. at 822–23, 94 S.Ct. 2800.

[21] The response of the defendants to the matters set forth in this opinion consistently has been that they cannot alleviate the conditions because of inadequate funding by the state legislature. However, a state is not at liberty to

afford its citizens only those constitutional rights which fit comfortably within its budget. The Alabama Legislature has had ample opportunity to make provision for the state to meet its constitutional responsibilities in this area, and it has failed to do so. It is established beyond doubt that inadequate funding is no answer to the existence of unconstitutional conditions in state penal institutions.

> Let there be no mistake in the matter; the obligation of the Respondents to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what Respondents may actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States.

[331] *Holt v. Sarver*, 309 F.Supp. at 385. See *Finney v. Arkansas Board of Corrections*, 505 F.2d 194, 201 (8th Cir. 1974); *Gates v. Collier*, 501 F.2d 1291, 1319–20 (5th Cir. 1974).

[22–25] In *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214

(1975), the Supreme Court held that, under Section 1983, plaintiffs can recover money damages from state officials if the officials acted either in bad faith or in "disregard of settled, indisputable law." *Id.* at 321, 95 S.Ct. 992. To put it another way: a public official may be held liable where he, in subjective good faith, acts in disregard of a person's "clearly established constitutional rights." *Id.* at 322, 95 S.Ct. 992. The Court now acts in these cases with a recognition that prisoners are not to be coddled, and prisons are not to be operated as hotels or country clubs. However, this does not mean that responsible state officials, including the Alabama Legislature, can be allowed to operate prison facilities that are barbaric and inhumane. Let the defendant state officials now be placed on notice that failure to comply with the minimum standards set forth in the order of this Court filed with this opinion will necessitate the closing of those several prison facilities herein found to be unfit for human confinement.

The costs of these proceedings will be taxed against the defendants.

An order will be entered accordingly.

ORDER

Pursuant to the findings of fact and conclusions of law set forth in the memorandum opinion made and entered in this cause this date, it is the order, judgment and decree of this Court that:

1. Defendants, George C. Wallace, individually and in his official capacity as Governor of Alabama; The State of Alabama; The Alabama Board of Corrections; Judson C. Locke, Jr., individually and in his official capacity as Commissioner of the Alabama Board of Corrections; L. B. Sullivan, individually and in his capacity as Deputy Commissioner of the Alabama Board of Corrections; Bill Long, individually and in his official capacity as Warden of Kilby Corrections Facility; J. O. Davis, individually and as Warden of G. K. Fountain Correctional Center; M. B. Harding, individually; H. Crouch, individually; Yetta G. Samford, Jr., individually; Dr. Max V. McLaughlin, individually; and Reverend John E. Vickers, Dr. Thomas F. Staton, Dr. Marion L. Carroll, Jr., and Mr. Thomas E.

Bradford, Sr., individually and as members of the Board of Corrections of the State of Alabama, their agents, employees, successors in office and any others acting in concert with them, be and each is hereby enjoined from failing to implement fully and within the times prescribed each of the requirements set forth in Appendix A to this decree.

2. A Human Rights Committee for the Alabama Prison System be and is hereby designated and appointed. The members of that Committee are listed in Appendix B attached hereto and incorporated herein. The members of the Committee shall be paid on a per diem basis and shall be reimbursed for travel and other expenses necessarily incurred at the same rate and in the same manner as members of the Alabama Board of Corrections. The function of the Human Rights Committee, acting as a Committee as a whole or through standing subcommittees appointed by the Committee chairman, shall be to monitor implementation of the standards set forth in Appendix A to this decree. In view of this Court's finding that the standards established in *Newman v. Alabama*, 349 F.Supp. 278, *aff'd in part* 503 F.2d 1320

(5th Cir. 1974), *cert. denied* 421 U.S. 928, 95 S.Ct. 1680, 44 L.Ed.2d 102 (1975), have not been implemented, the Human Rights Committee shall also have the authority and duty to monitor implementation of the requirements of that order. The Committee may at reasonable times inspect the state prison facilities, interview inmates, and inspect institutional records. The Committee shall review plans for implementation of this decree to ensure that they comport with the minimum standards set forth. At its
[332] discretion, the Committee may engage and consult appropriate, independent specialists who shall be compensated by the Board of Corrections. The Committee shall be authorized to take any action reasonably necessary to accomplish its function. The Committee is also hereby authorized and empowered to employ upon a full time basis a staff consultant, trained and experienced in the operation of state prison systems, answerable only to the Human Rights Committee; said full time consultant shall be paid upon a basis and at a rate commensurate with the remuneration being received by the Commissioner of the Alabama Board of Corrections. The Committee is further authorized and em-

powered to employ [to be paid by the defendant Board] one full time clerk-stenographer, responsible only to the Committee. Adequate physical facilities and equipment and supplies will be made available to the consultant and to the clerk by the Alabama Board of Corrections.

3. The defendants, within six months from this date, shall submit to this Court a comprehensive report setting forth their progress in the implementation of each and every standard. The report shall set forth reasons for the incomplete implementation of any standard. The report shall also include a time-table for full compliance.

4. The court costs incurred in these proceedings be and are hereby taxed against the defendants. The defendants are ordered to pay to the Clerk of this Court within 30 days the court costs, as set forth on the costs bills of plaintiffs' attorneys.

5. Jurisdiction of these cases be and is hereby specifically retained.

APPENDIX A

MINIMUM CONSTITUTIONAL STANDARDS FOR INMATES OF ALABAMA PENAL SYSTEM

I. *Overcrowding*

1. The number of inmates in each institution in the Alabama penal system shall not exceed the design capacity for that institution. No new prisoners, except escapees and parole violators who have had their paroles revoked, may be accepted until the inmate population is no greater than the design capacity for each facility.

II. *Segregation and Isolation*

1. No more than one prisoner shall be confined in a single cell, and each such cell shall be a minimum of 40 square feet. Within six months, the area of each single occupancy isolation cell shall be no less than 60 square feet.

2. Each cell shall be equipped with a toilet which can be flushed from the inside, a sink with hot and cold running water, ventilation and lighting which

meet minimum standards of the United States Public Health Service, clean linen, and a bed off the floor.

3. Each inmate confined in isolation shall be

(a) permitted to bathe at least every other day;

(b) provided three wholesome and nutritious meals per day, served with eating and drinking utensils;

(c) supplied the same toilet articles and linens as are required to be provided to the general inmate population;

(d) provided reading and writing materials, and allowed any personal legal papers or research materials;

(e) allowed at least 30 minutes outdoor exercise per day; and

(f) afforded adequate medical and mental health care, including examination by a physician and a qualified mental health care professional at least every third day. No inmate shall be deprived of physical aids or prosthetic devices.

4. Confinement in isolation shall be imposed as punishment only after compliance with the requirements of due

process as set forth in *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). Any period of con-
[333] finement for the purpose of punishment shall not exceed 21 days.

5. Any prisoner who is voluntarily segregated must be released immediately upon request.

6. The confinement of any prisoner in administrative segregation must be reviewed at least every seven days, and the prisoner must be released from segregation unless such review determines that there is good cause for continued segregation.

III. *Classification*

1. By April 15, 1976, the defendants shall file with the Court a plan for the classification of all inmates incarcerated in the Alabama penal system. The Board of Corrections shall contract with the University of Alabama Department of Correctional Psychology to aid in the implementation of that plan. The classification shall be fully completed no later than August 16, 1976.

2. The plan to be submitted to the Court shall include:

(a) due consideration to the age; offense; prior criminal record; vocational, educational and work needs; and physical and mental health care requirements of each inmate;

(b) methods of identifying aged, infirm, and psychologically disturbed or mentally retarded inmates who require transfer to a more appropriate facility, or who require special treatment within the institution; and

(c) methods of identifying those inmates for whom transfer to a pre-release, work-release, or other community-based facility would be appropriate.

3. The classification of each inmate shall be reviewed at least annually.

IV. *Mental Health Care*

1. The defendants shall identify those inmates who, by reason of psychological disturbance or mental retardation, require care in facilities designed for such persons, and arrangements shall be made for the transfer of such inmates.

2. The defendants shall identify those inmates who require mental health care

within the institution and make arrangements for the provision of such care.

3. The defendants shall hire at least those mental health professionals and support personnel as set forth in *Minimum Mental Health Standards for the Alabama Correctional System.* (Center for Correctional Psychology, University of Alabama, December 1972).

V. *Protection from Violence*

1. The defendants shall make reasonable efforts, including classification and monitoring, to segregate inmates known to engage in violence and aggression.

2. Only minimum custody inmates may be assigned to dormitories.

3. The defendants shall establish regular procedures, including frequent shakedowns and frisks of inmates returning to the institutions, to reduce the number of weapons held by inmates.

4. Defendants shall enforce prison regulations designed to reduce violence, including rules against fighting, possession of weapons, gambling, or possession of currency within the institutions. Inmates, except those in pre-release and work-release type programs, shall not possess currency. Defendants shall insti-

tute a scrip system for approved intra-institutional purchases by inmates.

5. With the exception of isolation units, guards shall be stationed inside living areas, including dormitories, at all times. There shall be at least one guard inside, and one guard outside, all living areas at all times. As to isolation units, guards must be stationed at all times so as to have visual and voice contact with the isolated prisoners.

6. At no time shall prisoners be used to guard other prisoners, nor shall prisoners be placed in positions of authority over other inmates.

7. The defendants shall keep accurate records of incidents of violence which come to their attention, and all assaults
[334] and other offenses punishable under the laws of Alabama shall be reported forthwith to the local district attorney. Accurate records shall be kept reflecting the disposition of such incidents by prison authorities and any resultant criminal prosecutions undertaken.

VI. *Living Conditions*

1. Prisoners shall be supplied, without charge, toothbrushes, toothpaste,

shaving cream, razors and razor blades, soap, shampoo, and combs. Each prisoner also shall be provided adequate clean clothing and a storage locker with a lock.

2. Each prisoner shall be supplied weekly with clean bed linen and towels.

3. Each inmate shall have access to household cleaning supplies in order to maintain living areas, and sanitary conditions within the institutions shall meet minimum public health standards. The defendants shall be responsible for implementing a regular and effective program of insect and rodent control.

4. All institutions shall be adequately heated, lighted and ventilated. Windows and doors shall be properly screened and otherwise properly maintained. Electrical wiring must be safe.

5. Each prisoner shall have a bed off the floor, a clean mattress, and blankets as needed.

6. Each institution shall maintain in working order one toilet per 15 inmates, one urinal or one foot of urinal trough per 15 inmates, one shower per 20 inmates, and one lavatory per 10 inmates.

7. Each inmate shall have a minimum of 60 square feet of living space.

VII. *Food Service*

1. Every prisoner is entitled to three wholesome and nutritious meals per day, served with proper eating and drinking utensils.

2. The food served to inmates shall be nutritionally adequate and properly prepared under the direction of a food service supervisor for each institution; each supervisor shall have at least bachelor's level training in dietetics or its equivalent. The defendants shall employ a nutrition consultant for the Board of Corrections, who shall be a registered dietitian, to assist in menu planning, methods of food preparation, purchasing standards, and sanitation.

3. Food shall be stored, prepared and served under sanitary conditions which meet minimum public health standards. Equipment shall be maintained in good working condition. All kitchen employees shall be trained in the handling of food and those who assist in the preparation of food shall receive training in food preparation. Regulations relating to food service will be rigorously enforced.

4. Each inmate who requires a special diet for reasons of health or religion shall be provided a diet to meet his or her individual need.

VIII. *Correspondence and Visitation*

1. Defendants shall not limit the number or length of letters a prisoner may send or receive. Mail to or from courts, attorneys or other public officials shall be inspected only for contraband, and only in the presence of the prisoner to whom it is addressed or by whom it is mailed. Inspection or censorship of other mail must be in accordance with the standards set forth in *Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1973). The defendants shall supply postage and paper for up to five letters per week for each inmate.

2. Each institution shall provide a comfortable, sheltered area for visitation. The visiting area must not, except for security purposes that have been documented, physically separate visitors from inmates. Visitation policies must permit an inmate to receive visitors on at least a weekly basis, and rules governing visitation must allow reasonable time and space for each visit. Visitors shall

not be subjected to any unreasonable searches. Inmates undergoing initial classification shall not be denied visitation privileges.

[335] IX. *Educational, Vocational, Work and Recreational Opportunities*

1. Each inmate shall be assigned a meaningful job on the basis of the inmate's abilities and interests, and according to institutional needs. Inmates shall not be required or allowed to perform household or personal tasks for any person.

2. Each inmate shall have the opportunity to participate in basic educational programs.

3. Each inmate shall have the opportunity to participate in a vocational training program designed to teach a marketable skill.

4. The defendants may establish reasonable entrance requirements and rational objective criteria for selecting inmates to participate in particular programs. However, no inmate shall be denied educational, vocational and work opportunities except while in isolation for disciplinary reasons or when the par-

ticipation of an inmate in a particular program presents a clear threat to institutional security.

5. Every inmate, prior to release, shall be afforded the opportunity to participate in some transitional program designed to aid in his or her re-entry into society.

6. Each institution shall employ a qualified full-time recreation director with at least bachelor's level training, or its equivalent, in recreation or physical education. Adequate equipment and facilities shall be provided to offer recreational opportunities to every inmate. Space shall be available for inmates to engage in hobbies. Suitable vocational programs shall be provided.

X. *Physical Facilities*

1. Defendants shall ensure that the physical plant of each facility in the Alabama penal system meets all of the minimum standards of the United States Public Health Service.

(a) Physical facilities in Draper Correctional Center shall meet minimum standards by December 15, 1976. A report setting forth

progress in the implementation of this requirement shall be filed 60 days before that date.

(b) Physical facilities in G. K. Fountain Correctional Center shall meet minimum standards by December 15, 1976. A report setting forth progress in the implementation of this requirement shall be filed 60 days before that date.

(c) Physical facilities in Holman Unit Prison shall meet minimum standards by December 15, 1977. A report setting forth progress in the implementation of this requirement shall be filed six months before that date.

(d) Physical facilities in Kilby Corrections Facility shall meet minimum standards by December 15, 1977. A report setting forth progress in the implementation of this requirement shall be filed six months before that date.

2. The defendants shall establish work-release, pre-release, and other community-based facilities to house inmates identified as appropriate for participation in such programs.

XI. *Staff*

1. Qualified staff sufficient to maintain institutional order and to administer programs shall be employed by the defendants, including a total custodial staff at each institution of no less than

Draper	184
Kilby	171
Fountain	178
Holman	159

2. Defendants shall provide appropriate and effective training programs for all staff members employed within the Alabama penal system.

3. Defendants shall immediately institute an affirmative hiring program designed to reduce and having the effect of reducing the racial and cultural disparity between the staff and the inmate population.

[336]

APPENDIX B

MEMBERSHIP OF THE HUMAN RIGHTS COMMITTEE FOR THE ALABAMA PRISON SYSTEM

1. Mr. M. R. Nachman, Jr.—Chairman-

   -P.O. Box 668
   Montgomery, Alabama 36101

2. Mr. Oscar W. Adams, Jr.

   2121 Building
   Birmingham, Alabama 35203

3. Dr. Mary Catherine Beasley

   14 Park Wood
   Tuscaloosa, Alabama 35401

4. Dr. Wiley R. Boyles

   3243 Fernway Drive
   Montgomery, Alabama 36111

5. Dr. Fred Campbell

   1722 Pine Street
   Montgomery, Alabama 36106

6. Dr. John Murphy Chenault

   1115 Somerville Road
   Decatur, Alabama 35610

7. Dr. Nace R. Cohen

750 Washington Avenue
Montgomery, Alabama 36104

8. Mr. Lee P. Dodd

Double Springs, Alabama 35553

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APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

[Filed Feb. 2 1979]

Civil Action No. 3501-N

N.H. NEWMAN, AND OTHERS,
Plaintiffs,

v.

STATE OF ALABAMA, ET AL.,
Defendants,

UNITED STATES OF AMERICA,
Amicus Curiae.

Civil Action No. 74-57-N

JERRY LEE PUGH, for himself and all others
similarly situated,
Plaintiffs,

v.

LARRY D. BENNETT, individually and in his official
capacity as Commissioner of the Alabama Board of
Corrections, ET AL.,
Defendants,

BARRY E. TEAGUE, United States Attorney,
Amicus Curiae.

Civil Action No. 74-203-N

WORLEY JAMES, ET AL.,
Plaintiffs,

v.

LARRY BENNETT, individually and in his official capacity as Commissioner of the Alabama Board of Corrections, ET AL.,
Defendants,

THE NATIONAL PRISON PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC., and BARRY E. TEAGUE, United States Attorney,

Amici Curiae.

ORDER

Upon consideration of the findings of fact and conclusions of law made and entered in this case this date, and pursuant thereto, it is the ORDER, JUDGMENT and DECREE of this Court that Fob James, as Governor of the State of Alabama, be and he is hereby appointed temporary receiver of the prison system of the State of Alabama.

It is further ORDERED that this appointment as receiver be for a period of not less than one year, unless and until the receiver requests to be relieved or the Court orders a termination of the receivership before a year elapses.

It is further ORDERED that this appointment be for the purpose of carrying out the duties imposed by the Constitution of the United States and by the orders of this Court as set forth in *Newman v. Alabama*, 349 F. Supp. 278 (1972), *aff'd*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975) and in *Pugh v. Locke*, 406 F. Supp. 318 (1976), *aff'd and remanded sub nom., Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied in pertinent part*, 46 U.S.L.W. 3802 (June 27, 1978).

It is further ORDERED that the Board of Corrections of the State of Alabama transfer to the Governor Fob James, as receiver all of its functions, duties, powers and authority to manage, supervise and control all penal and correctional institutions in the State of Alabama and all funds now held or controlled and all other duties and functions imposed upon the said Board under the laws of Alabama, including without limitation the power to hire, discharge, suspend and supervise the Commissioner of Corrections, deputy commissioners, and any other personnel employed by the Board.

It is further ORDERED that the members of the Board of Corrections, and all other defendants in these actions, their agents, servants, and employees, and all persons in active concert or participation with them, be and are hereby ENJOINED from failing to immediately comply with this order and from interfering in any manner, either directly or indirectly, with the receiver in the performance of his functions and duties as receiver.

It is further ORDERED that the members of the Board of Corrections, and all other defendants in these actions, their agents, servants, employees and attorneys, and all persons in active concert or participation with them, be and are hereby ENJOINED from failing to cooperate with the receiver in the performance of his functions and duties as receiver.

It is further ORDERED that the temporary receiver file with this Court quarterly reports.

Done, this the 2nd day of February, 1979.

/s/ Frank M. Johnson, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
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Amici Curiae.

MEMORANDUM

On October 4, 1972, this Court held that the failure of the Board of Corrections to afford the basic elements of adequate medical care to inmates in the Alabama Prison System constituted "a willful and intentional violation" of their rights under the Eighth and Fourteenth Amendments. *Newman v. Alabama*, 340 F. Supp. 278, 287. Four years later, when the Court issued its order in *Pugh v. Locke*, 406 F. Supp. 318 (1976), those same serious shortcomings persisted. What *Pugh* revealed, however, was that such shortcomings were endemic to every phase of the prison system's operation. The conditions of confinement then violated any judicial definition of cruel and unusual punishment. In September, 1978, hearings were held to determine the degree of compliance by the Board of Corrections with the *Newman* and *Pugh* orders.[1] The overwhelming weight of the evidence presented at that time established that what was true in 1972 and

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[1] The findings and conclusions set forth in this memorandum are based upon the evidence presented at that hearing and the various reports filed with this Court by the plaintiffs, the amici and defendants.

1976 is still true today. While some progress has been made, the Board of Corrections has not in several critical areas achieved substantial compliance with the Court's orders. The very fact of confinement in Alabama's Penal System continues to contravene the Eighth and Fourteenth Amendment rights of plaintiffs.

The response of the Board of Corrections in 1976 was that the state legislature had failed to provide adequate funds. Despite the clear command of the law that the state may not discount constitutional rights, the excuse of the Board remains that the legislature has been remiss. That excuse has no legal weight. It may be true that the legislature has failed to meet its constitutional responsibilities in this area. But what the evidence now so strikingly reveals is that even within funding limitations imposed by the legislature, the Board has failed to make a genuine effort at compliance. In area after area, the Board has made no serious attempt to determine what steps can be taken with present funds and to plan what can be accomplished with additional sums. The theme running throughout the evidence is a lack of professional leadership. The Court is compelled to conclude that there is no reasonable likelihood of effective cooperation and substantial compliance from the present Board of Corrections. The passage of three years since *Pugh* makes the need for comprehensive relief more urgent than ever.

I. OVERCROWDING

All institutions are in compliance with the requirement that the number of inmates not exceed the design capacity of the facility. This goal has only been achieved, however, by creating a backlog of 1,800 state prisoners in the city and county jails throughout Alabama. It is undisputed that the conditions in the county jails are worse

than any that exist in the state prisons. Alabama's city and county jails were not designed to house long-term detainees. The evidence suggests that in almost if not every instance they fall below the minimum constitutional standards set forth in the *Pugh* order. Overcrowding is the norm. There is no classification system in the jails, with the result that offenders of all types are placed together. The jails are unsanitary and in a state of disrepair, and inspections have disclosed that many are serious fire hazards. Medical care is practically non-existent. In most jails, the prisoners receive no meaningful work, no programs, no exercise. Overcrowding in the prisons has been relieved only at the price of aggravated violations of the rights of state prisoners in the county jails.

The Board has presented no long-term plan to solve this problem. There were plans to build two 400-person facilities with the money from the 1977 bond issue. Indecisiveness, coupled with rising costs, makes it likely that only one can be built with that money now. In its comprehensive plan submitted to the Court on January 17, 1979, the Board proposes to construct four institutions, which will provide 1,700 additional spaces by 1981. Even accepting the Board's optimistic timetable, the problem of state prisoners backed up in the county jails will not be ended. The Board's own projections indicate that there will still be almost 1,000 state prisoners in the city and county jails in 1981. And even that projection makes the questionable assumption that Fountain and Draper can be improved to meet minimum constitutional standards. This prospect of continued non-compliance with this crucial aspect of the Court's order requires further relief.

II. CLASSIFICATION

In 1976, all prisoners were classified, and a system of classification was developed. Since that time, the system has deteriorated and no longer functions in accordance with the Court Order. The experts attributed the problem to a lack of leadership and concluded that a replacement was necessary to run the program. The Court adopts that testimony. The classification staff at the institutions are not properly trained, have an insufficient understanding of the purposes of classification, and operate with no professional guidance. No handbook or guidelines have been provided for the staff's use. It is not surprising, then, that procedures have broken down and inconsistent standards are being applied. Often the initial classification decision is not made by a multi-disciplinary team composed of a psychologist, classification specialist, and correctional counselor, but by the "classification specialist" acting alone. The Central Review Board, in reviewing classifications, also does not meet as a team, and it, too, operates without written criteria. More seriously, classification decisions are dictated by the disciplinary system. Indicative is the fact that the Central Review Board almost always reverses the institutional team when the warden recommends a higher custody classification. As a result, while the initial classification resulted in a determination that 700 prisoners should be classified "medium custody," the subsequent classification decisions by the Board have resulted in almost double that number being so classified. This development has had a detrimental impact on prisoners' access to jobs, activities, and programs. Indeed the classification system does not play its intended role in the assignment of institutional work. There, too, the recommendations of the wardens, none of whom are classification specialists, seem to be controlling. Meaningful classification has also been undercut by the continued employ-

ment of certain guidelines as absolute bars to pre-release or work-release programs. As a result, the highly successful Frank Lee Youth Center has had a vacancy rate of 30 to 50 out of 200 places despite the fact that there are hundreds of first-time offenders (for non-violent crimes) at Draper and in the county jails who are potentially eligible for that program. Another result is that the current inmate population at Frank Lee, as in 1976, continues to be over 50 percent white, although the prison system population as a whole is predominantly black.

In addition to failing to maintain an adequate, ongoing classification process, the Board has failed to correct the "traumatic and stressful" conditions at its Kilby facility which render unreliable the initial testing and evaluation of new prisoners. The mingling of prisoners regardless of offense and propensity to violence, combined with the absence of security in the cellblocks and dormitories, is an invitation to violence of all kinds. One 18-year-old prisoner testified that he had been raped on four successive days during daylight hours while awaiting classification at Kilby. Effective and reliable classification of inmates, which in large part is the basis of the safety of all inmates, will not be achieved until these conditions are corrected. The problem is less one of money than of management.

III. MENTAL HEALTH CARE

In *Newman*, the Court found that the mentally ill, the disturbed, and the retarded were unidentified and were dispersed throughout the prison population without treatment. The evidence upon this submission reflects that nothing has been done to correct the situation. There is now some effort at identification of those with mental problems. But the record of housing and treatment of

such persons is one of total failure and non-compliance. What defendants deem the best facility for housing those with severe emotional and mental problems is the same with severe emotional and mental problems is the same 12 cell area at Kilby that was in use at the time of this Court's original hearing. Many of those with mental problems at Fountain, Holman, and Tutwiler are housed in segregation cells and in punitive isolation. The consensus of experts was that these cells were unfit for the housing of persons with mental problems. Many of the mentally disturbed are simply left in the general population, where they are particularly vulnerable to harassment and assault. Indeed, of the mentally retarded, more have been placed at Fountain—the most violent of the institutions—than at any other place. The Court's order provides that those who require treatment in mental institutions be transferred there. Defendants admit that it is virtually impossible for inmates to be transferred to facilities operated by the Department of Mental Health. In the last two years, only 46 persons have been transferred, and most have been returned within 30 days after having been put on medication but not having received treatment.

Non-compliance also exists as to the requirement that the Board hire adequate numbers of mental health professionals and support personnel. The Board employs no psychiatrist either full-time or as a consultant. There is only one licensed clinical psychologist. He spends 80 percent of his time at Kilby. The other staff listed as "psychologists" are not trained clinical psychologists and are not licensed to practice psychology. Even these "psychologists" provide almost no counselling. At Holman, the staff of five devotes a total of 55 hours per week to counselling. At Tutwiler, there is no staff member available for counselling. Because of the lack of trained doc-

tors, psychotropic medication is prescribed without proper supervision and controls.

As of May, 1978, there were no special programs or housing for the mentally retarded. Subsequently, 65 mentally retarded inmates were moved to a dormitory at Staton, and defendants indicate that they will be provided special education teachers. For the remaining identified mentally retarded inmates, the Board apparently has no program and no plan. Recently defendants have sought a federal grant to provide alcohol and drug counselling for inmates going into community release programs. But in spite of the evidence that 40 to 60 percent of the prison population abuses drugs, defendants in the last two years have afforded counselling for only a handful of prisoners.

In light of the clear mandate of the Court in this area, the minimal efforts at compliance by the Board reflect an attitude of deliberate indifference to the mental health needs of the inmate population.

IV. PROTECTION FROM VIOLENCE

Further, the Court concludes from the evidence that robbery, rape, and assault remain everyday occurrences among the general prison population in Alabama. The dormitories particularly are still places of fear and violence. Defendants admit non-compliance with the requirement that guards be stationed in the living areas, including dormitories. The dormitories, they say, are too dangerous for the guards to enter. That fear is well taken. The number of reported incidents of prosecutable crimes of violence shows a steady increase over the last four years. And it is axiomatic in the prison setting that the number of unreported crimes far outnumbers those which are reported.

The Board has not taken the first steps to curb this pattern of violence which makes a mockery of the Eighth Amendment's protection against cruel and unusual punishment. The Board has deliberately ignored the requirement that guards be stationed in the dormitory units at night. Had the Board proceeded with alternatives such as sallyports or catwalks, it could be credited with a good faith effort to comply with the order. All too typically, however, such alternatives are mere talk. The random shakedowns conducted by defendants have not eliminated weapons in the prison population. The recommendation of the Legislative Prison Task Force that metal detectors be installed to check prisoners has not yet been acted upon. These failures are just additional evidence of the managerial incompetence of the Board and its staff, including the Commissioner, Deputy Commissioner and a good number of its wardens. The present correctional staff provide custody, but not security. Considering the other existing conditions, such a prison system is not constitutionally acceptable.

V. LIVING CONDITIONS

The evidence indicates some improvement in the general level of cleanliness in the dormitories and food service areas. Toilet articles are now supplied to all prisoners, as are clean bed linen and towels. The Board does not, however, provide adequate clothing. Underwear and socks are not provided at all, and, at Fountain, trousers are not furnished. These failings pale alongside those concerning the general sanitary and safety conditions in the prisons. In *Pugh*, this Court found that Alabama's penal institutions were "filthy." While there has been improvement, the evidence reflects that each of the major institutions falls far below all minimum health and safety standards. It is not necessary to recite in detail what

plaintiffs' expert, a United States public health officer, found when he toured Draper, Fountain, Holman, and Kilby again after two years. The Court credits his testimony now as it did then. Fountain and Draper continue to be "unfit for human habitation." At both institutions, lighting, ventilation, and heating remain inadequate. The living and food preparation areas are infested with vermin and rodents. Fire safety is non-existent. After two years, many flammable mattresses remain in use,[2] guards have not been trained in evacuation, and fire fighting equipment is lacking. The food service at both prisons offers striking evidence of mismanagement. Food service personnel remain untrained, garbage is not properly handled, and equipment is not maintained.

The other institutions reveal similar problems. At Holman, lighting and ventilation remain unchanged. Temperatures in the living areas last winter were as low as 50 degrees. Fire safety also remains a problem. Indeed, flooding of the basement utility room has caused major electrical shortages and raises a serious risk of explosion. The roof and windows leak, posing a health hazard to inmates who must live and sleep in damp surroundings. The same public health problems exist at Kilby. At Tutwiler, these shortcomings are compounded by what the State Fire Marshal deemed a "major hazard to life and property" from the overloaded and deteriorated electrical system.

While a final solution to these problems awaits adequate funding by the legislature, the Court has not even

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[2] The Alabama Board of Corrections' "plan" to acquire mattresses that meet the fire code requirements is to purchase them from the North Carolina prison system, which system—with prison labor—makes them.

been presented with evidence of that kind of improvement which could be expected from diligent management alone. Where the prison living conditions still pose an imminent danger to the health of inmates, the Board has not achieved compliance with minimum constitutional requirements.

VI. FOOD SERVICE

As the discussion of living conditions suggests, food service is not in substantial compliance with the Court order. Inmates are now served three meals a day, and kitchen conditions have improved. But food is not prepared under conditions that meet minimum public health standards; equipment is not maintained in good working order; kitchen employees are not adequately trained; and food distribution to inmates in single cells remains essentially unchanged since 1976.

VII. EDUCATIONAL, VOCATIONAL, WORK, AND RECREATIONAL OPPORTUNITIES

The Board has failed completely to provide meaningful work for all inmates. Idleness is prevalent throughout the system. Institutional work assignments are few and most take only a small time to perform. The number of industry jobs has declined by twenty since 1976. Even the jobs in the tag plant are seasonal. Since the Prison Industries Division was created in 1977, only one new industry with merely 30 jobs has been started. The Division has formulated no concrete plans for the development of further industrial programs. Plans to open a canning plant in conjunction with the new Staton prison were eliminated by the Board, and Staton opened with no jobs available other than institutional work assignments. As this Court noted in *Pugh*, the lack of meaningful work

contributes to boredom and frustration. Those in turn contribute to violence and mental and physical degeneration. The failure of the Board to address this central problem reflects again its inability to convert talk into action.

Vocational education and work-release programs have been expanded. But, too, substantial compliance has not been achieved because of management problems. Of 736 total spaces, more than 100 are vacant at any given time. In March, 1978, CETA funds were forfeited because the Board refused to parole or place on work-release trainees within a short period after graduation. As in 1976, eligibility requirements for most programs are quite strict. The breakdown of the classification system contributes to non-compliance in this area as well.

VIII. PHYSICAL FACILITIES

The Board has complied with paragraph (2) of this section to the extent that it has established work-release and other community-based facilities. But as the discussion of Living Conditions clearly reflects, Draper, Fountain, Holman, and Kilby do not meet all of the minimum standards of the United States Public Health Service. Therefore the Board is not in substantial compliance with this section.

IX. STAFF

The Board admits that it has failed to employ sufficient personnel as set forth in the Court's order. When Staton prison was opened, it was staffed with personnel drawn from the other institutions in the system. The total custodial staff is inadequate even under the revised staffing standards proposed by amicus National Prison Project on December 11, 1978.

X. MEDICAL CARE

Six years after *Newman*, the Board is still not in substantial compliance with the order entered in that case. The evidence reflects small gains, but glaring inadequacies have yet to be corrected. The most significant deficiency is in the quantity and quality of the medical staff. Of 105 authorized positions for medical staff, only 51 are filled. The system employs no full-time psychiatrist. Only the medical director is a licensed physician, and he is not full-time. Otherwise, the system is provided medical care by two unlicensed physicians with the title "physician's assistant," one physician with a limited license, and one with a suspended license. In addition, the Board has contracted with a group of residents to provide 20 hours of care per week at Fountain and Holman and with another physician to provide 5 hours of care per week for Draper, Staton, and Frank Lee. The medical director for Alabama's Prison System testified that the system needed at least four additional full-time physicans. Likewise, there is a need for four additional R.N.'s. At the present time, only Kilby is served by an R.N. This situation reflects almost no progress since 1972. Dental care, too, is inadequate with but one full-time and one part-time dentist for the entire prison system. Quotas have been assigned to each institution. The backlog of inmates waiting to see a dentist has resulted in care limited to extractions, with little or no rehabilitative work done. As previously indicated, mental care is non-existent.

No effort has been made to bring the Medical and Diagnostic Center at Kilby into compliance with the minimum Medicare standards as required by the Court. A lack of professionalism characterizes the administration of the prison hospital. Patients with different strains of hepatitis have been placed in the same ward at great risk

to life. There is no hospital dietitian and no medical records librarian. A laboratory technician has been serving as hospital administrator. These conditions amply reflect that the medical director has failed to comply with the order of the Court that he develop a program of continual evaluation of all facilities and all personnel. The delivery of medical care in the Alabama Prison System is not characterized by poor management, but by no management.

A general lack of supervision is evident with respect to other provisions of the *Newman* order. The medication distribution system is lax and record-keeping is poor. Evacuation plans and written sanitation procedures, if in existence, are not referred to and utilized. The medical facilities have not been regularly inspected by the Fire Marshal and the Health Department. While the experts who testified disagreed about the need for specific items of medical equipment, there is no dispute that what equipment is ordered arrives only after long delays. Emergency transportation to free-world medical facilities is often unreliable because of the lack of security personnel. And the simple task of preparing job descriptions has not been completed.

The natural consequence of this understaffing and inadequate supervision is the continued evidence of medical treatment by inmates. One inmate testified that he gave injections and performed a hemorrhoidectomy; another testified that he filled teeth and performed dental surgery, for guards as well as for inmates.

The cumulative effect of these deficiencies and abuses is a threat to life and limb that violates the Eighth Amendment. The Board of Corrections' continued non-compliance with the minimum constitutional requirements set down by the Court conclusively establishes that there is

no reasonable likelihood of compliance in the near future from that quarter.

* * *

Time does not stand still, but the Board of Corrections and the Alabama Prison System have for six years. Their time has now run out. The Court can no longer brook non-compliance with the clear command of the Constitution, represented by the orders of the Court in this case. Plaintiffs are entitled to prompt and effective relief. Living conditions that constitute an imminent danger to health; inadequate medical care that poses a threat to life; and insufficient security that sanctions the law of the jungle—these facts describe a state of emergency demanding decisive action. It is clear that the Board of Corrections is incapable of effective leadership. Difficult as the Board's position was made by the lack of adequate funding, the Court finds that the Board could have ameliorated the conditions confronting it, but instead contributed to the gravity of the situation by its indifference and incompetence. The lack of any significant progress since the original hearings in this case strongly suggests that the appointment of monitors offers little, if any, hope of swift compliance. The extraordinary circumstances of this case dictate that the only alternative to non-compliance with the Court's orders is the appointment of a receiver for the Alabama prisons. The Court will thus grant that relief, first requested by plaintiffs in June, 1978. Further injunctions or contempt proceedings will not accomplish the task of compliance; such remedies promise only confrontation and delay. When the usual remedies are inadequate, a court is justified in resorting to a receivership, particularly when it acts in aid of an outstanding injunction. *Morgan v. McDonough*, 540 F.2d 527 (1st Cir. 1976); *see, Swann v. Charlotte-Mecklenburg*

Board of Education, 401 U.S. 1 (1971); *Green v. County School Board*, 391 U.S. 430 (1968); *Griffin v. County School Board*, 377 U.S. 218 (1964); *Turner v. Goolsby*, 255 F. Supp. 724 (S.D. Ga. 1966). There is, of course, a more extreme alternative to a receivership. In *Pugh*, the Court put defendants on notice that failure to comply with the minimum standards set forth in the order would necessitate the closing of several prison facilities. In light of that alternative, the more reasonable and the more promising approach is the appointment of Governor Fob James as receiver for the prison system.

There can be no doubt that the paramount duty of the federal judiciary is to uphold the law. That is why, when a state fails to comply with the Constitution, the federal courts are compelled to enforce it. The habit that some states have fallen into of ignoring their responsibilities until they are faced with a federal court order is by now an all too well-known syndrome. The history of federal litigation in Alabama is replete with instances of state officials who could have chosen one of any number of courses to alleviate unconstitutional conditions of which they were fully aware, and who chose instead to do nothing. Consequently the federal courts time after time have been required to step into the vacuum left by the state's inaction. Regrettably, such orders result in the loss of some of the autonomy and flexibility the state might have exercised in the control of its public institutions had it chosen to accept the responsibility for their management before it was too late. That responsibility is one the Court will gladly relinquish to those who are elected to do it, if they are willing to undertake it. As this Court has publicly stated upon many occasions: "The Court looks forward to the day when responsible officials of the State of Alabama will assume their constitutional and

legal obligations to run the state institutions in a manner that does not violate the Constitution and laws of the United States. Such a course of action would, of course, enable this Court to relinquish its substantial control of Alabama's governmental operations." By his petition to be appointed receiver, Governor James appears to have accepted that mantle of responsibility as far as the operation of the Alabama Prison System is concerned. Accordingly, an order will be entered appointing him receiver of the Alabama Prison System for the purpose of complying with the minimum requirements of the Constitution as embodied in this Court's previous orders.

Done, this the 2nd day of February, 1979.

/s/ Frank M. Johnson, Jr.
UNITED STATES DISTRICT JUDGE

Office - Supreme Court, U.S
FILED
JUN 25 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1704

IN THE

Supreme Court Of The United States

October Term, 1982

LARRY BENNETT, JR., JOHN E. VICKERS, DR. MARION CARROLL, DR. THOMAS F. STATON, J. LOUIS WILKINSON, W. S. HAMNER, JOE OLIVER, JOE RAINES, and JUDSON C. LOCKE, JR.,

Petitioners,

v.

BOBBY WILLIAMS,

Respondent.

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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No. 82-1704

IN THE

Supreme Court Of The United States

October Term, 1982

LARRY BENNETT, JR., JOHN E. VICKERS, DR. MARION CARROLL, DR. THOMAS F. STATON, J. LOUIS WILKINSON, W. S. HAMNER, JOE OLIVER, JOE RAINES, and JUDSON C. LOCKE, JR.,

Petitioners,

v.

BOBBY WILLIAMS,

Respondent.

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STATEMENT OF THE CASE

The petition for certiorari inadequately describes the salient factual and procedural events in this case.

The plaintiff, Bobby Williams, was sentenced to prison at the age of seventeen and had been there for approximately one year before the events which are the subject of this case occurred on January 10, 1978. On that day the plaintiff was sleeping on his dormitory bunk in Holman Prison shortly after he had eaten lunch. (Tr. 645). While he slept, another inmate, Larry Cook, borrowed a sharp-

ened butter knife from an inmate in the kitchen and proceeded down the main corridor of the prison toward the plaintiff's dormitory. (Tr. 354, 348). He was not searched after leaving the kitchen or during his walk through the corridor, even though the defendant officials admitted that such searches are mandatory every time an inmate leaves the prison kitchen. (Tr. 349-350). As Mr. Cook walked down the corridor he searched for the presence of any guards in or around the plaintiff's dormitory and entered the dormitory when he did not see any guards. (Tr. 350). He walked around the plaintiff's bed to make sure he was sleeping and then went back out to the main corridor to make sure there were no guards in the area. (Tr. 350). He admitted that he did not want any guards to see him when he killed the plaintiff. (Tr. 350-351). He then returned inside the dormitory, walked straight to the sleeping plaintiff and began stabbing him with the sharpened butter knife. (Tr. 351). He stabbed the plaintiff at least 27 times in all parts of his upper body[1] and then left him unconscious in a bed of blood. (Tr. 344). After doing so, he walked over to a group of inmates who had assembled some distance away and "asked" them to leave the plaintiff unattended and without assistance. (Tr. 344-345). He testified that it was his intent to kill the plaintiff and

[1]As a result of the attack by Mr. Cook, the plaintiff received twenty-seven stab wounds. (Tr. 459). Approximately twelve of these wounds were of a penetrating nature while the others were cuts and lacerations. (Tr. 70-74). The penetrating wounds were to the neck, back and chest causing lacerating injuries to the aorta, innominate veins, carotid artery and vertebral artery. (Tr. 77-78). Mr. Williams arrived at the Emergency Room of Greenlawn Hospital in Atmore, Alabama with only an occasional gasping breath and no blood pressure. (Tr. 86). He survived the wounds, but as a result of them, his spinal cord was severed causing total quadriplegia. (Tr. 458, 461). He spent almost all of 1978 in various hospital facilities. He has been in and out of the hospital since that time. (Tr. 494-495). The quadriplegia has caused total loss of use of his arms and legs, loss of bowel and bladder control, inability to perform sexual functions and total dependency on others for his daily care. (Tr. 461-462).

that he did not want anyone to aid the plaintiff in any way. (Tr. 344-345). One of the inmates eventually summoned defendant Raines, who was the Acting Captain of the Guards. (Tr. 248). Larry Cook testified that the first guard arrived about five minutes after he had left the plaintiff to die. (Tr. 353).

The defendants admit that there were no guards inside or outside of the dormitory where the plaintiff slept on January 10, 1978. (Tr. 113, 133, 243-244, 250-251, 334). This was not an isolated occurrence. The defendants admitted that they had never stationed a guard on the inside of the dormitories and stationed guards in the protective observation cubicle outside the dormitory only on an irregular basis.[2] (Tr. 283, 111, 268).

In January, 1976, after a lengthy trial, then District Judge Frank Johnson entered a decision in the case of *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *affirmed with modifications sub nom., Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied in relevant part, sub. nom., Alabama v. Pugh*, 483 U.S. 781, 98 S. Ct. 3057, 56 L. Ed. 2d 1114 (1978) (App. 70a - 180a). In that decision the district court found that incarceration in Holman Prison constituted cruel and unusual punishment. Among other things, the court in *Pugh, supra*, found that:

> Violent inmates are not isolated from those who are young, passive or weak. Consequently, the latter inmates are repeatedly victimized by those who are stronger and more aggressive. Testimony shows that robbery, rape, extortion, theft and assault are everyday

[2]The refusal to station guards both inside and outside the dormitory in which the plaintiff slept was a direct violation of an injunction which was entered in January, 1976 in *Pugh v. Locke, supra* at 333 (App. 146a). That injunction required that "guards shall be stationed inside living areas, including dormitories at all times." *Id.* at 333. (App. 146a). It also required that "[t]here shall be at least one guard inside, and one guard outside, all living areas at all times". *Id.* (App. 146a).

occurrences among the general inmate population. Rather than face this constant danger, some inmates voluntarily subject themselves to the inhuman conditions of prison isolation cells.

* * *

In view of the foregoing, the rampant violence and jungle atmosphere throughout Alabama penal institutions are no surprise. The evidence reflects that most prisoners carry some form of homemade or contraband weapon, which they consider to be necessary for self-protection. Shakedowns to remove weapons are neither sufficiently thorough nor frequent enough to significantly reduce the number of weapons. There are too few guards to prevent outbreaks of violence, or even to stop those which occur.

* * *

The conditions in which Alabama prisoners must live, as established by the evidence in these cases, bear no reasonable relationship to legitimate institutional goals. As a whole they create an atmosphere in which inmates are compelled to live in constant fear of violence, in imminent danger to their physical well being, and without opportunity to seek a more promising future.

* * *

Prison officials are under a duty to provide inmates reasonable protection from constant threat of violence. ***

The defendants in these cases have failed to carry out that duty. The evidence establishes that inmates are housed in virtually unguarded, overcrowded dormitories, with no realistic attempt by officials to separate violent, aggressive inmates from those who are passive or weak. The tension generated by illness and deplorable living conditions contributes further to the ever-present threat of violence from which inmates have no refuge. *Id.* at 406 F. Supp. at 324-330. (App. 115a - 133a).

Approximately one year after the entry of these findings and the injunctive remedies which they prompted, the plaintiff was incarcerated in Holman Prison by the defendants in this action. The prison conditions to which he was subjected were unchanged from those condemned as cruel and unusual the year before in *Pugh, supra.* This was clearly established by Judge Johnson in findings of fact entered in *Pugh*[3] concerning the continuing pattern of rampant violence in unguarded dormitories between 1976 and September, 1978. *Newman v. State of Alabama,* 466 F. Supp. 628 (M.D. Ala. 1979). After reviewing all of the evidence on the conditions of Holman Prison and other prisons between 1976 and 1978, the Court in *Pugh* and *Newman* found:

> In September, 1978, hearings were held to determine the degree of compliance by the Board of Corrections with the *Newman* and *Pugh* orders. The overwhelming weight of the evidence presented at that time established that what was true in 1972 and 1976 is still true today. While some progress has been made, the Board of Corrections has not in several critical areas achieved substantial compliance with the Court's orders. The very fact of confinement in the Alabama Penal System continues to contravene the Eighth and Fourteenth Amendment rights of plaintiffs.
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> Further, the Court concludes from the evidence that robbery, rape, and assault remain everyday occurrences among the general prison population in Alabama. The dormitories particularly are still places of fear and vio-

[3]The defendant – petitioners have failed to include the 1979 findings of fact in *Pugh* and *Newman* in the Appendix to their Petition. These findings were relied upon by the Court of Appeals in considering whether *Pugh* should be given the effect of collateral estoppel in this case. *Williams v. Bennett,* 689 F.2d 1370, 1375 (11th Cir. 1982) (App. 8a - 9a). The defendant – petitioners' Appendix is inadequate without inclusion of the 1979 findings of fact of Judge Johnson in *Pugh* and *Newman.* A copy of such findings is attached to this Brief and is reported at 466 F. Supp. 628 (M.D. Ala. 1979).

lence. Defendants admit non-compliance with the requirement that guards be stationed in the living areas, including dormitories. The dormitories, they say, are too dangerous for the guards to enter. That fear is well taken. The number of reported incidents of prosecutable crimes of violence shows a steady increase over the last four years. And it is axiomatic in the prison setting that the number of unreported crimes far outnumbers those which are reported.

The Board has not taken the first steps to curb this pattern of violence which makes a mockery of the Eighth Amendment's protection against cruel and unusual punishment. The Board has deliberately ignored the requirements that guards be stationed in the dormitory units at night. Had the Board proceeded with alternatives such as sallyports or catwalks, it could be credited with a good faith effort to comply with the order. All too typically, however, such alternatives are mere talk. The random shakedowns conducted by defendants have not eliminated weapons in the prison population. The recommendation of the Legislative Prison Task Force that metal detectors be installed to check prisoners has not yet been acted upon. These failures are just additional evidence of the managerial incompetence of the Board and its staff, including the Commissioner, Deputy Commissioner and a good number of its wardens. The present correctional staff provide custody but not security. Considering the other existing conditions, such a prison system is not constitutionally acceptable.

* * *

Time does not stand still, but the Board of Corrections and the Alabama Prison System have for six years. Their time has now run out. The Court can no longer brook non-compliance with the clear command of the Constitution, represented by the orders of the Court in this case. Plaintiffs are entitled to prompt and effective relief. Living conditions that constitute an imminent danger to health; inadequate medical care that poses a threat to life; and insufficient security

> that sanctions the law of the jungle — these facts describe a state of emergency demanding decisive action. It is clear that the Board of Corrections is incapable of effective leadership. Difficult as the Board's position was made by the lack of adequate funding, the Court finds that the Board could have ameliorated the conditions confronting it, but instead contributed to the gravity of the situation by its indifference and incompetence. *Newman v. Alabama,* 466 F. Supp. 628, 629-635 (M.D. Ala. 1979).

The defendants' Petition is obviously incorrect when it asserts that the findings in *Pugh* were limited to the conditions extant in 1976. Pet., p. 10. The decision below in the current case specifically held that "[t]he judge's findings and conclusions [in *Pugh*] therefore covered the conditions in the Alabama prisons at the time of the incident upon which the current action is based". *Williams v. Bennett,* 689 F.2d 1370, 1375 (11th Cir. 1982) (App. 8a - 9a).

Prior to the stabbing of the plaintiff on January 10, 1978, all of the defendants in this action knew of the findings and remedial orders entered in *Pugh v. Locke, supra.* (Tr. 267-268, 374, 376, 108-109, 390, 398, 400). As the Court of Appeals noted "[a]ll of the current defendants — with the exception of the warden, deputy warden, captain and assistant captain of the guards at Holman Prison — or their predecessors in office were named defendants in the *Pugh* litigation". *Williams v. Bennett,* 689 F.2d 1370, 1382 (11th Cir. 1982) (App. 31a.). As to the four defendants herein who were not named as defendants in *Pugh,* the Court of Appeals determined that they "were nevertheless bound by the injunction as 'agents, employees, successors in office or any others acting in concert with the named defendants". *Id.* at n.13 (App. 31a, n.13).

The defendants in the current case were aware that they had never complied with the Constitutional standards set

forth in *Pugh* or provided the plaintiff and other inmates at Holman with reasonable protection from violence. (Tr. 111-112, 268, 130-132). They were also aware that the stationing of guards in and around the dormitories would deter violence of the sort which left the plaintiff a quadriplegic. (Tr. 255-256, 263-264, 256, 269, 146, 147, 149, 313-314, 316, 276, 127). More specifically, they knew that if they had stationed one guard on the inside and one guard on the outside of the Holman dormitory there was a substantial likelihood that they could have prevented the stabbing of the plaintiff. (Tr. 254, 128, 149, 317-318). Indeed, the assailant himself admitted that he was looking for guards as far away as in the hallway outside the dormitory because he feared that they might see him kill the plaintiff. (Tr. 350-351). Only after he assured himself that there were no guards in or around the dormitory did he attack the plaintiff. (Tr. 350-351).

The petitioners are incorrect in their description of the decision of the Court of Appeals. That decision did not impose any automatic liability on the defendants in this action because of the judgment in *Pugh*. The Court of Appeals "conclude[d] that *Pugh* has no preclusive effect on the issue of individual constitutional wrongdoing". *Williams v. Bennett, supra* at 1383. (App. 34a). The decision examined the preclusive effect of *Pugh* on three discrete issues.[4] These issues were:

> a. Whether the conditions and practices in Holman Prison were cruel and unusual? *Id.* at 1382. (App. 30a).

[4]On a fourth issue involving the availability of a qualified immunity or a good faith defense, the Court of Appeals precluded further litigation but not because of the doctrine of collateral estoppel. *Williams v. Bennett, supra* at 1386. (App. 43a - 44a). Since this issue does not involve collateral estoppel, it is discussed in a separate section of this Brief. See page 19 hereinbelow.

b. Whether the conditions and practices in Holman Prison proximately caused the plaintiff's injuries? *Id.* at 1384-1385 (App. 38a - 40a).

c. Whether each individual defendant "exhibited 'deliberate indifference' which was a producing cause of the Eighth Amendment violation"? *Id.* at 1382-84 (App. 31a - 38a).

On the first two issues, the Court of Appeals held that the defendants were collaterally estopped from further denial and litigation. On the third issue, however, the decision below clearly held that the defendants were not estopped from further denial and litigation. After noting that the plaintiff must prove "deliberate indifference" in order to establish individual liability for cruel and unusual punishment, the Court held that "*Pugh* does not estop each of the current defendant officials from attempting to establish that he did not exhibit such deliberate indifference". More specifically, it held that:

> The critical causation issue here must be whether each individual defendant was in a position to take steps that could have averted the stabbing incident at Holman but, through callous indifference, failed to do so. Resolution of this issue necessarily entails a very individualized approach, taking into account the duties, discretion and means of each defendant. *Id.* at 1384 (App. 36a).

On this point, the Court of Appeals did not collaterally estop or preclude the defendants from further litigation.

The defendants' Petition to this Court is also incorrect when it asserts that *Pugh* "did not require or expect immediate compliance and established procedures to stay abreast of the progress being made toward compliance". Pet., p. 5. First, there is nothing within *Pugh* which supports the notion that it did not "require or expect immediate compliance" with its injunctive orders. The findings and con-

clusions entered on February 2, 1979 by Judge Johnson demonstrated that the defendants failed to satisfy the 1976 injunctive requirements in *Pugh* throughout the 1976-1978 period of time. *Pugh v. Locke,* 466 F. Supp. 628 (M.D. Ala. 1979). Secondly, even assuming that the defendants' contention is correct, the Court of Appeals decision below did not accord any preclusive effect to the *Pugh* injunction. *Williams v. Bennett, supra* at 1386-87 (App. 45a - 47a). The Court of Appeals spoke directly to this subject:

> Before closing our discussion of collateral estoppel, we find it necessary to comment on the distinction between the findings of the district court in *Pugh* and its subsequent injunction. *Pugh* has a preclusive effect on the present case because its findings established that the conditions at the prison constituted cruel and unusual punishment in violation of the eighth amendment at the time Williams was assaulted. Because the failure to maintain the prison in countenance with the constitution violated Williams' right to be free from cruel and unusual punishment, Williams need not prove that he was the victim of a constitutional violation. The obstacle now facing Williams is the attachment of legal responsibility for his injuries to one or more of the defendants. This will require proof of callous indifference.
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> Nevertheless, a defendant may not avoid liability by relying on the timetable seen as having been incorporated in the district court's injunction in *Pugh*. Having made his findings in *Pugh,* the district judge may well have contemplated that a considerable period of time would be necessary to correct the deficiencies in the Alabama prisons. See 406 F. Supp. at 332. Defendants in this case appear to have successfully argued that they could not have been guilty of any wrongdoing in continuing unconstitutional conditions as long as the conditions were corrected within the time allowed by the *Pugh* injunction. This simply is incorrect. The district judge in *Pugh* did not undertake to amend the

constitution by suspending it for a certain period of time. The fact that the court did not require correction of the conditions by immediate mandatory injunction, does not absolve the state or the individual defendants of liability for constitutionally related injuries arising in the interim. Time given in an injunction is no license to exercise callous indifference for awhile. Although contempt may be avoided during this time, the possibility of liability continues to exist. Indeed, even in the absence of the *Pugh* case, an inmate who could prove injury resulting from unconstitutionally cruel and unusual punishment would have a viable cause of action. No one is permitted to violate the constitution until a judge has found the violation to exist, and, where one has been found to exist, no one is entitled to continue unconstitutional action, free of liability, until the time set in an injunction for its correction. It is the findings of unconstitutionality in *Pugh* which is relevant to the present case, not the correction time limits included in the *Pugh* injunction. *Id.*

REASONS FOR DENYING THE WRIT

I. Collateral Estoppel Was Denied By The Court Of Appeals On The Issue Of Individualized Responsibility

The defendants' Petition to this Court mischaracterizes the holding of the Court of Appeals. The holding below did not collaterally estop or otherwise preclude the defendants in this action from contesting their individual liability for the injuries incurred by the plaintiff. *Williams v. Bennett, supra* at 1382-84 (App. 31a - 38a). To the contrary, the Court of Appeals left this issue open for the jury to decide when the case is retried on remand. The Court of Appeals carefully considered the standards applicable to the offensive use of collateral estoppel set forth in *Parklane Hosiery v. Shore,* 439 U.S. 322, 99 S. Ct. 645, 58 L.Ed. 2d 552 (1979), and concluded that it *should not be used* to

estop the defendant "on the issue of individual constitutional wrongdoing". *Williams v. Bennett, supra* at 1383 (App. 34a). The Court of Appeals plainly held *in the petitioners favor* on the very issue they now describe as "reckless" and "shocking". In the Court of Appeals' own words:

> . . . it is clear that *Pugh* did not resolve the state of mind or intent of any particular one of the current defendants in failing to perform acts within his official responsibility. Hence one of the prerequisites of collateral estoppel, identity of these issues in the prior and subsequent action, is missing here. The district court's comments in *Pugh* addressed the corporate fault of the state officialdom with responsibility for operation of the Alabama penal system, not the existence of individual fault on the part of each of — or any one of — the current defendants. The latter focus is critical here. *** *Such matters remain to be litigated.* Accordingly, we conclude that *Pugh* has no preclusive effect on the issue of individual constitutional wrongdoing. Our examination of the *Pugh* litigation convinces us that the causation element in that case is not identical to the causation requirement at issue here. *** [W]hen individuals are being sued in individual capacities for damages for personal injuries, the causation inquiry must be more refined and focused than that undertaken in *Pugh*, where only declaratory and injunctive relief were sought for constitutional violations pervading an entire prison system. *** By contrast, the critical causation issue here must be whether each individual defendant was in a position to take steps that could have averted the stabbing incident at Holman but, through callous indifference, failed to do so. Resolution of this issue necessarily entails a very individualized approach, taking into account the duties, discretion and means of each defendant. *Id.* at 1383-84 (App. 35a - 36a). (emphasis supplied).

The defendants' Petition never mentions the fact that the Court of Appeals ruled in their favor on the critical

issue of "individualized causation". It is, of course, true that the decision below did estop the defendants from denying that the conditions of confinement in Holman Prison are cruel and unusual and that these conditions contributed to the plaintiff's injuries. Since the only defendants in this case are individual defendants sued in their individual capacities, however, the critical issue for their personal liability was not foreclosed by this aspect of the decision below. The Court below distinguishes:

> . . . between the individualized causation requirement (proof that a defendant contributed to the unconstitutional prison conditions), and the more generalized causation requirement (proof that the unconstitutional prison conditions contributed to Williams' injuries). Although the former remains to be litigated with respect to each individual defendant, the latter was litigated effectively in the prior suit. *Williams v. Bennett, supra* at 1384 (App. 38a - 39a).

When viewed free from the exaggerated alarm of the defendants' Petition, the decision below clearly took a middle road which accommodates the competing demands of remedying cruel and unusual punishment on the one hand and chilling the exercise of responsibility by public officials on the other. The Court of Appeals imposed the preclusive effect of estoppel on two issues but refused to impose such effect on the third, and most crucial, issue. In doing so, the Court carefully applied the standards of *Parklane Hosiery v. Shore, supra.*

The defendants' contention to the contrary cannot be squared with the plain language of the holding below. The petitioners quarrel with two points of the Court of Appeals' decision. First, it contends that it is "unfair" to collaterally estop it from contesting the cruel and unusual nature of confinement in Holman Prison because the issues in the case were not "identical" in terms of the capacities

of the parties and the relief that was sought. Each of the grounds for this contention in the Petition, however, were considered by the Court below. *Williams v. Bennett, supra* at 1382 (App. 30a - 32a). In response to the same contentions raised in the Petition, the Court of Appeals said:

> We do not perceive an unfairness in estopping the defendants' relitigation of the Eighth Amendment issue. All of the current defendants — with the exception of the warden, deputy warden, captain, and assistant captain of the guards of Holman — or their predecessors in office were named defendants in the *Pugh* litigation. In light of the serious constitutional violations alleged and the broad declaratory and injunctive relief sought in *Pugh*, the defendants had every incentive to litigate the Eighth Amendment issue fully and vigorously. The journey of the case through the appellate courts evidences the fact of their vigorous defense. See, *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part sub nom, Alabama v. Pugh*, 438 U.S. 781, 98 S. Ct. 3057, 56 L.Ed. 2d 1114 (1978). Moreover, there are no procedural opportunities in the present case that were unavailable to the *Pugh* defendants and of a kind that would be likely to alter the resolution of the Eighth Amendment issue. *Id.* at 1382 (App. 30a - 32a).

The petitioners' contention that the Court of Appeals did not correctly consider whether this case is "identical" to *Pugh* ignores the fact that this was the very reason that the Court did not collaterally estop the issue of individualized causation. On that issue, the Court of Appeals found that this case and *Pugh* did not involve identical considerations. However, on the issues of whether the conditions of confinement were cruel and unusual and whether such conditions contributed to the plaintiff's injuries, the Court below found the requisite "fairness" to impose the preclusive effect of collateral estoppel. The careful balancing of the

considerations of "fairness" by the Court below is apparent on the face of its treatment of these three discrete issues.

Secondly, the defendant contends that the decision below conflicts with the approach taken in several other Circuits and in the predecessor of the Eleventh Circuit.[5] The defendants' own argument, however, admits that use of collateral estoppel "should depend on the *fairness of applying the doctrine in the context of the particular fact situations*". Pet., p. 9. (Emphasis supplied by petitioner). Each of the cases cited by the petitioners do not involve conflicting legal principles but only different factual circumstances. The mere existence of differing factual circumstances which cause opposite results to be reached when identical legal principles are applied is not sufficient to invoke review by certiorari. Such differences are exactly what this Court intended when it vested discretion in the lower courts[6] in applying the preclusive effect of collateral estoppel in *Parklane Hosiery*. The cases cited in the Petition as "conflicting" are consistent with the current case in the legal principles recognized and applied.

For these reasons, the defendant has failed to present any legitimate reasons for the granting of its Petition in regard to the issue of collateral estoppel. The court below correctly followed the legal principles so recently addressed in

[5]In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc) the Eleventh Circuit adopted as precedent all former Fifth Circuit cases submitted or decided prior to October 1, 1981. In *Stein v. Reynolds Sec., Inc.*, 667 F.2d 33, 34 (11th Cir. 1982), the court held that Unit B panel or en banc court decisions of the former Fifth Circuit also are binding precedent in the Eleventh Circuit.

[6]It is no answer that *Parklane Hosiery* vested such discretion in the district courts in the first instance. The mere existence of discretion in the district courts "hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review". *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416, 95 S. Ct. 2362, 2371, 45 L.Ed. 2d 280 (1975). The appellate courts must review such discretion and correct its abuse whenever the district court fails to properly apply the standards set forth in *Parklane Hosiery*. That is exactly what the court below did.

Parklane Hosiery and there is no conflict in the application of these principles in the various Circuits.

II. Preclusion Of Qualified Immunity By Objective Knowledge Of The Holding In *Pugh*

The defendants continue their mischaracterization of the decision below by arguing that the Eleventh Circuit has misapplied the "objective test" of *Harlow v. Fitzgerald,* 102 S. Ct. 2727 (1982). The defendants' Petition admits that "the Eleventh Circuit acknowledged the ruling in *Harlow* that under the objective test defendant government officials would be shielded from liability for civil damages if their conduct did not 'violate clearly established statutory or constitutional rights of which a reasonable person would have known' ". Pet., p. 14. They complain, however, that the court below "ignored the pleading and proof requirements implicit in the *Harlow* decision". They ask for the right to "at least assert" the qualified immunity defense. Pet., p. 15.

No court has prevented the defendants from "at least asserting" the qualified immunity defense. When they asserted it in a Motion for Summary Judgment in this case in 1979, Judge Johnson denied the Motion on the basis of both the objective and subjective prong of the qualified immunity defense. On the "objective test" of such defense, Judge Johnson held:

> Defendants can no more successfully evade the first exception to the qualified immunity defense as a matter of law. The stabbing which paralyzed plaintiff occurred two years after the Court's Order in *Pugh v. Locke,* 406 F. Supp. 318 (M.D. Ala. 1976). It therefore cannot be argued that, in 1978, defendants were unaware that constant exposure to violence and threats of violence undermine a prisoner's Eighth Amendment rights. It follows under *Wood v. Strickland* that if defendants understood the constitutional norm, they are

> stripped of any immunity. See *Procunier v. Navarette*, 434 U.S. at 562. Thus, it also follows that summary judgment must be denied to the defendants in their individual capacities. (R. 62).

In their Answer to the Complaint the defendants did not plead qualified immunity as a defense as required by F. R. Civ. P. 8 (c).[7] Neither did they identify any qualified immunity or "good faith" defense during the discovery process prior to trial.[8] From all appearances the defendants had abandoned the qualified immunity defense after their Motion for Summary Judgment was denied in 1979. Nevertheless, at the close of trial in December, 1980, the defendants attempted to reassert such immunity. By this time, Judge Johnson had been elevated to the Eleventh Circuit and the case was being tried before District Judge Truman Hobbs. Judge Hobbs once again carefully considered the assertion of a qualified immunity by the defendants and then held, *on the basis of all the evidence at trial*, that such defense should not be presented in the instructions to the jury because the defendants knew or should have known that *Pugh v. Locke, supra*, had clearly established the plaintiff's constitutional rights and had clearly established that refusal to provide the reasonable protection from violence mandated in *Pugh* violated such rights. (Tr. 1236).

On appeal, the Court of Appeals confirmed Judge Johnson's and Judge Hobbs' view that the defendants could not assert a qualified immunity because *Pugh* had specifically

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[7]The defendant officials moved the court for allowance of an Amendment to their Answer to add a "good faith" affirmative defense and a "lack of money" defense. (R. 226). That Amendment was never allowed by the district court as required by Federal Rule of Civil Procedure 15.

[8]The plaintiff served interrogatories on the defendants requesting, *inter alia*, disclosure of their defenses, the facts supporting each such defense and the evidence which would be used to prove such facts at trial. (R. 70-74). The defendants eventually answered the interrogatories. (R. 116, 173, 176, 181). In their answers the defendants did not disclose "good faith" as a defense or assert any other affirmative defense.

put these particular defendants on notice that the conditions and practices at Holman Prison, including the practice of placing inmates in unguarded dormitories, constituted cruel and unusual punishment. The Eleventh Circuit's reasoning on this point conforms *exactly* to the standards of *Harlow*.

> To the extent that good faith is defined essentially in objective terms, if defendants should have known that their conduct in maintaining an unconstitutional prison violated Williams' rights, then their good faith defense will be defeated. In the context of the present case, the *Pugh* order not only clearly defined the constitutional rights of the Alabama prisoners, but also served to put the defendant officials on notice of the continuing violations. As the court stated in *Pugh*:
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> > In *Wood v. Strickland*, 420 U.S. 308, 95 S. Ct. 992, 43 L.Ed. 2d 214 (1975), the Supreme Court held that, under Section 1983, plaintiffs can recover money damages from state officials if the officials acted either in bad faith or in 'disregard of settled, indisputable law'. *Id.* at 321, 95 S. Ct. 992. To put it another way: a public official may be held liable where he, in subjective good faith, acts in disregard of a person's 'clearly established constitutional rights'. *Id.* at 322, 95 S. Ct. 992. The Court now acts in these cases with a recognition that prisoners are not to be coddled, and prisons are not to be operated as hotels or country clubs. However, this does not mean that responsible state officials, including the Alabama Legislature, can be allowed to operate prison facilities that are barbaric and inhumane. Let the defendant state officials now be placed on notice that failure to comply with the minimum standards set forth in the order of this Court filed with this opinion will necessitate the closing of those several prison facilities herein found to be unfit for humane confinement.

406 F. Supp. at 331 (emphasis added). Thus, defendants are precluded from now asserting that they should not have known that failure to meet the constitutional norms established in *Pugh* would violate Williams' constitutional rights. Although this is not preclusion in the sense that the good faith defense was litigated in the earlier suit, the determination of a constitutional violation in *Pugh* effectively precludes the defense because of the court's clear delineation of the prisoner's rights.

In precluding the assertion of a good faith defense by an individual defendant, however, we do not disallow the admission of evidence demonstrating the subjective intent of a defendant. As discussed above, a claim alleging a constitutional deprivation of cruel and unusual punishment requires proof of deliberate or callous indifference on the part of each defendant. The focus of this inquiry necessarily centers on individual motives and reactions. Moreover, evidence tending to prove deliberate or callous indifference is the same evidence which would have been used to defeat a good faith defense under the subjective criteria. [citations omitted]. Because of the required proof of deliberate or callous indifference, therefore, the subjective good faith and intent of the individual defendants remain relevant even in light of the objectivity now associated with the good faith defense. *Williams v. Bennett, supra* at 1385-86. (App. 41a - 45a).

It would make a mockery of the Eighth Amendment and § 1983 to allow these defendants to assert before a jury that they could not be expected to know that housing the plaintiff in an unguarded dormitory in Holman Prison constituted cruel and unusual punishment. They were told *exactly that* in *Pugh v. Locke* by the district court. That decision was affirmed in relevant part at every appellate stage. The defendants in the current case admitted at trial that they knew of the holding to that effect in *Pugh*. (Tr. 109, 267-268, 374, 376, 108-109, 390, 394, 398, 400). They

also admitted that they knew that they had never complied with the requirements of *Pugh* and that they continued to house the plaintiff and other inmates in unguarded dormitories after they were enjoined from doing so. (Tr. 111-112, 268, 130-132).

The defendants' knowledge of the Constitutional norms established in *Pugh* for Holman Prison was not limited merely to the extensive findings and injunctive remedies that were entered. As pointed out by the Court below, *Pugh* included a specific warning from Judge Johnson that money damages could be recovered from the public officials who allowed an inmate to be subjected to the "barbaric and inhumane" conditions found at Holman Prison. Those public officials who received that notice in *Pugh* are the same ones who are now defendants in the current case. *Williams v. Bennett, supra* at 1382 and n.13 (App. 31a). A more perfect form of prior notice to public officials that their specific actions constitute cruel and unusual punishment cannot be found.

III. Jury Instruction On The Source Of Payment Of Any Judgment

The defendant contends that the district court was merely attempting to correct an erroneous impression left by the plaintiff's attorney on the source of payment when it instructed the jury that the individual plaintiff would have to pay any judgment themselves and that the State of Alabama would never have to pay any amount for them. The defendant does not cite any part of the Record for this proposition. The reason is apparent. There is nothing in the Record which supports it. The plaintiff's attorney never made any argument to the jury that the State would have to pay any judgment rendered against the individual defendants and the district court never stated that it was in-

structing the jury to the contrary in order to correct such an argument.

Moreover, the defendants never made the argument that it now makes during the proceedings in the Court of Appeals. In their Brief in the Court of Appeals the defendants argued that the instruction on source of payment was given "[i]n order to explain dismissal of the suit against the defendants in their official capacities. . . ." Def.'s Br. in 11th Cir., p. 46. They never even hinted in their written or oral arguments in the Eleventh Circuit that the district court gave the challenged instruction on source of payment in order to correct prejudicial remarks of the plaintiff's attorney on such subject. Having failed to raise the argument in the Court of Appeals, they should not be permitted to challenge the decision below on such grounds.

Even if the argument had been raised below, it has no merit. Two wrongs do not make a right. A district court cannot correct an erroneous comment of counsel by giving an erroneous instruction to the jury on the source of payment. The instruction to the jury that the state could never be made to pay any judgment rendered against the named individual plaintiffs was obviously in error for the reasons set forth in the opinion of the Court of Appeals. *Williams v. Bennett*, 689 F.2d 1370, 1391 (11th Cir. 1982). (App. 60a - 61a).

Neither does a district court have "discretion" to give an erroneous instruction to the jury. The defendants argue that the Court of Appeals failed to couch its holding in terms of an "abuse of discretion".[9] In making that argument, they state that "a trial judge [has] wide discretion in

[9]The defendants' Brief in the Court of Appeals did not argue that the "abuse of discretion" standard of review was applicable to jury instructions. Instead it argued that "the Court committed no error in instructing the jury with regard to the fact that the suit was against the defendants only in their individual capacities". Def.'s Br. in 11th Cir., p. 47.

determining *the manner and the language* he will use in instructing a jury". Pet., p. 18 (emphasis supplied). The Court of Appeals, however, did not reverse "the manner and the language" of the instruction. It reversed the legal substance of the instruction. *Williams v. Bennett*, 689 F.2d at 1391 (App. 60a - 62a). The district court does not have the discretion to give an instruction on a substantive legal principle which is erroneous as a matter of law. In such a circumstance, the abuse of discretion standard of review is inapplicable.

The defendants do not even bother to argue in their Petition to this Court that the contested jury instruction was substantively correct. Neither do they argue that the Court of Appeals' analysis of the substance of such instruction was incorrect as a matter of law. Instead, they prefer to argue that the Court of Appeals should have permitted the instruction to stand absent a finding that it was an "abuse of discretion" to give it. The Court of Appeals, however, found that the contested instruction was not only erroneous in its substantive content, but also "sufficiently prejudiced Williams to warrant reversal". *Id.* Even if the abuse of discretion standard were applicable, such an abuse was implicitly found by the Court of Appeals when it concluded that the instruction was legally erroneous and sufficiently prejudicial to warrant reversal. A district court which gives an instruction that tells the jury erroneous legal principles and causes prejudice to one of the litigants in doing so can be reversed even under the abuse of discretion standard of review.

CONCLUSION

This case is not one that should be reviewed by the Court. The Court of Appeals painstakingly followed the recent authoritative precedent laid down by this Court in *Parklane Hosiery* and *Harlow*. There is no conflict among the Circuits in the application of these authorities. Neither is there any aspect of the application of these authorities in the circumstances of this case which merits any further attention by this Court.

Respectfully submitted,

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Attorney for Respondent

N. H. NEWMAN et al., Plaintiffs,

v.

STATE OF ALABAMA et al., Defendants,

United States of America, Amicus Curiae.

Jerry Lee PUGH, for himself and all others similarly situated, Plaintiffs,

v.

Larry D. BENNETT, Individually and in his official capacity as Commissioner of the Alabama Board of Corrections, et al., Defendants,

Barry E. Teague, United States Attorney, Amicus Curiae.

Worley JAMES et al., Plaintiffs,

v.

Larry BENNETT, Individually and in his official capacity as Commissioner of the Alabama Board of Corrections, et al., Defendants,

The National Prison Project of the American Civil Liberities Union Foundation, Inc., and Barry E. Teague, United States Attorney, Amici Curiae.

Civ. A. Nos. 3501-N, 74-57-N and 74-203-N.

United States District Court, M. D. Alabama, N. D.

Feb. 2, 1979.

Hearings were held to determine degree of compliance by Alabama Board of Corrections with orders in prior proceedings challenging conditions of confinement. The District Court, Johnson, Chief Judge, held that where despite lack of adequate funding in six-year period since original order the State Board of Corrections could have ameliorated conditions confronting

it but, instead, contributed to gravity of the situation by its indifference and incompetence and appointment of monitors offered little, if any, hope of swift compliance, such extraordinary circumstances dictated that the only alternative to noncompliance was appointment of the governor as receiver for the Alabama state prisons.

Governor appointed as receiver.

MEMORANDUM

JOHNSON, Chief Judge.

On October 4, 1972, this Court held that the failure of the Board of Corrections to afford the basic elements of adequate medical care to inmates in the Alabama Prison System constituted "a willful and intentional violation" of their rights under the Eighth and Fourteenth Amendments. *Newman v. Alabama*, D.C., 349 F.Supp. 278, 287. Four years later, when the Court issued its order in *Pugh v. Locke*, D.C., 406 F.Supp. 318 (1976), those same serious shortcomings persisted. What *Pugh* revealed, however, was that such shortcomings were endemic to every phase of the prison system's operation. The conditions of confinement then violated any judicial definition of cruel and unusual punishment. In September, 1978, hearings were held to determine the degree of compliance by the Board of Corrections with the *Newman* and *Pugh* orders.[1] The overwhelming weight of the evidence presented at that time established that what was true in 1972 and 1976 is still true today. While some progress has been made, the Board of Corrections has not in several critical areas achieved substantial compliance with the Court's orders. The very fact of confinement in Alabama's Penal System continues to contravene the Eighth and Fourteenth Amendment rights of plaintiffs.

The response of the Board of Corrections in 1976 was that the state legislature had failed to provide adequate funds.

[1]The findings and conclusions set forth in this memorandum are based upon the evidence presented at that hearing and the various reports filed with this Court by the plaintiffs, the amici and defendants.

Despite the clear command of the law that the state may not discount constitutional rights, the excuse of the Board remains that the legislature has been remiss. That excuse has no legal weight. It may be true that the legislature has failed to meet its constitutional responsibilities in this area. But what the evidence now so strikingly reveals is that even within funding limitations imposed by the legislature, the Board has failed to make a genuine effort at compliance. In area after area, the Board has made no serious attempt to determine what steps can be taken with present funds and to plan what can be accomplished with additional sums. The theme running throughout the evidence is a lack of professional leadership. The Court is compelled to conclude that there is no reasonable likelihood of effective cooperation and substantial compliance from the present Board of Corrections. The passage of three years since *Pugh* makes the need for comprehensive relief more urgent than ever.

I. OVERCROWDING

All institutions are in compliance with the requirement that the number of inmates not exceed the design capacity of the facility. This goal has only been achieved, however, by creating a backlog of 1,800 state prisoners in the city and county jails throughout Alabama. It is undisputed that the conditions in the county jails are worse than any that exist in the state prisons. Alabama's city and county jails were not designed to house long-term detainees. The evidence suggests that in almost if not every instance they fall below the minimum constitutional standards set forth in the *Pugh* order. Overcrowding is the norm. There is no classification system in the jails, with the result that offenders of all types are placed together. The jails are unsanitary and in a state of disrepair, and inspections have disclosed that many are serious fire hazards. Medical care is practically non-existent. In most jails, the prisoners receive no meaningful work, no programs, no exercise. Overcrowding in the prisons has been relieved only at the price of aggravated violations of the rights of state prisoners in the county jails.

The Board has presented no long-term plan to solve this problem. There were plans to build two 400-person facilities with the money from the 1977 bond issue. Indecisiveness, coupled with rising costs, makes it likely that only one can be built with that money now. In its comprehensive plan submitted to the Court on January 17, 1979, the Board proposes to construct four institutions, which will provide 1,700 additional spaces by 1981. Even accepting the Board's optimistic timetable, the problem of state prisons backed up in the county jails will not be ended. The Board's own projections indicate that there will still be almost 1,000 state prisoners in the city and county jails in 1981. And even that projection makes the questionable assumption that Fountain and Draper can be improved to meet minimum constitutional standards. This prospect of continued non-compliance with this crucial aspect of the Court's order requires further relief.

II. CLASSIFICATION

In 1976, all prisoners were classified, and a system of classification was developed. Since that time, the system has deteriorated and no longer functions in accordance with the Court Order. The experts attributed the problem to a lack of leadership and concluded that a replacement was necessary to run the program. The Court adopts that testimony. The classification staff at the institutions are not properly trained, have an insufficient understanding of the purposes of classification, and operate with no professional guidance. No handbook or guidelines have been provided for the staff's use. It is not surprising, then, that procedures have broken down and inconsistent standards are being applied. Often the initial classification decision is not made by a multi-disciplinary team composed of a psychologist, classification specialist, and correctional counselor, but by the "classification specialist" acting alone. The Central Review Board, in reviewing classifications, also does not meet as a team, and it, too, operates without written criteria. More seriously, classification decisions are dictated by the disciplinary system. Indicative is the fact that the

Central Review Board almost always reverses the institutional team when the warden recommends a higher custody classification. As a result, while the initial classification resulted in a determination that 700 prisoners should be classified "medium custody," the subsequent classification decisions by the Board have resulted in almost double that number being so classified. This development has had a detrimental impact on prisoners' access to jobs, activities, and programs. Indeed the classification system does not play its intended role in the assignment of institutional work. There, too, the recommendations of the wardens, none of whom are classification specialists, seem to be controlling. Meaningful classification has also been undercut by the continued employment of certain guidelines as absolute bars to pre-release or work-release programs. As a result, the highly successful Frank Lee Youth Center has had a vacancy rate of 30 to 50 out of 200 places despite the fact that there are hundreds of first-time offenders (for non violent crimes) at Draper and in the county jails who are potentially eligible for that program. Another result is that the current inmate population at Frank Lee, as in 1976, continues to be over 50 percent white, although the prison system population as a whole is predominantly black.

In addition to failing to maintain an adequate, ongoing classification process, the Board has failed to correct the "traumatic and stressful" conditions at its Kilby facility which render unreliable the initial testing and evaluation of new prisoners. The mingling of prisoners regardless of offense and propensity to violence, combined with the absence of security in the cellblocks and dormitories, is an invitation to violence of all kinds. One 18-year-old prisoner testified that he had been raped on four successive days during daylight hours while awaiting classification at Kilby. Effective and reliable classification of inmates, which in large part is the basis of the safety of all inmates, will not be achieved until these conditions are corrected. The problem is less one of money than of management.

III. MENTAL HEALTH CARE

In *Newman*, the Court found that the mentally ill, the disturbed, and the retarded were unidentified and were dispersed throughout the prison population without treatment. The evidence upon this submission reflects that nothing has been done to correct the situation. There is now some effort at identification of those with mental problems. But the record of housing and treatment of such persons is one of total failure and non-compliance. What defendants deem the best facility for housing those with severe emotional and mental problems is the same 12 cell area at Kilby that was in use at the time of this Court's original hearing. Many of those with mental problems at Fountain, Holman, and Tutwiler are housed in segregation cells and in punitive isolation. The consensus of experts was that these cells were unfit for the housing of persons with mental problems. Many of the mentally disturbed are simply left in the general population, where they are particularly vulnerable to harassment and assault. Indeed, of the mentally retarded, more have been placed at Fountain—the most violent of the institutions—that at any other place.

The Court's order provides that those who require treatment in mental institutions be transferred there. Defendants admit that it is virtually impossible for inmates to be transferred to facilities operated by the Department of Mental Health. In the last two years, only 46 persons have been transferred, and most have been returned within 30 days after having been put on medication but not having received treatment.

Non-compliance also exists as to the requirement that the Board hire adequate numbers of mental health professionals and support personnel. The Board employs no psychiatrist either full-time or as a consultant. There is only one licensed clinical psychologist. He spends 80 percent of his time at Kilby. The other staff listed as "psychologists" are not trained clinical psychologists and are not licensed to practice psychology. Even these "psychologists" provide almost no counselling. At Holman, the staff of five devotes a total of 55 hours

per week to counselling. At Tutwiler, there is no staff member available for counselling. Because of the lack of trained doctors, psychotropic medication is prescribed without proper supervision and controls.

As of May, 1978, there were no special programs or housing for the mentally retarded. Subsequently, 65 mentally retarded inmates were moved to a dormitory at Staton, and defendants indicate that they will be provided special education teachers. For the remaining identified mentally retarded inmates, the Board apparently has no program and no plan. Recently defendants have sought a federal grant to provide alcohol and drug counselling for inmates going into community release programs. But inspite of the evidence that 40 to 60 percent of the prison population abuses drugs, defendants in the last two years have afforded counselling for only a handful of prisoners.

In light of the clear mandate of the Court in this area, the minimal efforts at compliance by the Board reflect an attitude of deliberate indifference to the mental health needs of the inmate population.

IV. PROTECTION FROM VIOLENCE

Further, the Court concludes from the evidence that robbery, rape, and assault remain everyday occurrences among the general prison population in Alabama. The dormitories particularly are stall places of fear and violence. Defendants admit non-compliance with the requirement that guards be stationed in the living areas, including dormitories. The dormitories, they say, are too dangerous for the guards to enter. That fear is well taken. The number of reported incidents of prosecutable crimes of violence shows a steady increase over the last four years. And it is axiomatic in the prison setting that the number of unreported crimes far outnumbers those which are reported.

The Board has not taken the first steps to curb this pattern of violence which makes a mockery of the Eighth Amendment's protection against cruel and unusual punishment. The Board has deliberately ignored the requirement that guards be

stationed in the dormitory units at night. Had the Board proceeded with alternatives such as sallyports or catwalks, it could be credited with a good faith effort to comply with the order. All too typically, however, such alternatives are mere talk. The random shakedowns conducted by defendants have not eliminated weapons in the prison population. The recommendation of the Legislative Prison Task Force that metal detectors be installed to check prisoners has not yet been acted upon. These failures are just additional evidence of the managerial incompetence of the Board and its staff, including the Commissioner, Deputy Commissioner and a good number of is wardens. The present correctional staff provide custody, but not security. Considering the other existing conditions, such a prison system is not constitutionally acceptable.

V. LIVING CONDITIONS

The evidence indicates some improvement in the general level of cleanliness in the dormitories and food service areas. Toilet articles are now supplied to all prisoners, as are clean bed linen and towels. The Board does not, however, provide adequate clothing. Underwear and socks are not provided at all, and, at Fountain, trousers are not furnished. These failings pale alongside those concerning the general sanitary and safety conditions in the prisons. In *Pugh*, this Court found that Alabama's penal institutions were "filthy." While there has been improvement, the evidence reflects that each of the major institutions fall far below all minimum health and safety standards. It is not necessary to recite in detail what plaintiffs' expert, a United States public health officer, found when he toured Draper, Fountain, Holman, and Kilby again after two years. The Court credits his testimony now as it did then. Fountain and Draper continue to be "unfit for human habitation." At both institutions, lighting, ventilation, and heating remain inadequate. The living and food preparation areas are infested with vermin and rodents. Fire safety is non-existent. After two

years, many flammable mattresses remain in use,[2] guards have not been trained in evacuation, and fire fighting equipment is lacking. The food service at both prisons offers striking evidence of mismanagement. Food service personnel remain untrained, garbage is not properly handled, and equipment is not maintained.

The other institutions reveal similar problems. At Holman, lighting and ventilation remain unchanged. Temperatures in the living areas last winter were as low as 50 degrees. Fire safety also remains a problem. Indeed, flooding of the basement utility room has caused major electrical shortages and raises a serious risk of explosion. The roof and windows leak, posing a health hazard to inmates who must live and sleep in damp surroundings. The same public health problems exist at Kilby. At Tutwiler, these shortcomings are compounded by what the State Fire Marshall deemed a "major hazard to life and property" from the overloaded and deteriorated electrical system.

While a final solution to these problems awaits adequate funding by the legislature, the Court has not been presented with evidence of that kind of improvement which could be expected from diligent management alone. Where the prison living conditions still pose an imminent danger to the health of inmates, the Board has not achieved compliance with minimum constitutional requirements.

VI. FOOD SERVICE

As the discussion of living conditions suggests, food service is not in substantial compliance with the Court order. Inmates are now served three meals a day, and kitchen conditions have improved. But food is not prepared under conditions that meet minimum public health standards; equipment is not maintained in good working order; kitchen employees are not ade-

[2]The Alabama Board of Corrections' "plan" to acquire mattresses that meet the fire code requirements is to purchase them from the North Carolina prison system, which system—with prison labor—makes them.

quately trained; and food distribution to inmates in single cells remains essentially unchanged since 1976.

VII. EDUCATIONAL, VOCATIONAL, WORK, AND RECREATIONAL OPPORTUNITIES

The Board has failed completely to provide meaningful work for all inmates. Idleness is prevalent throughout the system. Institutional work assignments are few and most take only a small time to perform. The number of industry jobs has declined by twenty since 1976. Even the jobs in the tag plant are seasonal. Since the Prison Industries Division was created in 1977, only one new industry with merely 30 jobs has been started. The Division has formulated no concrete plans for the development of further industrial programs. Plans to open a canning plant in conjunction with the new Staton prison were eliminated by the Board, and Staton opened with no jobs available other than institutional work assignments. As this Court noted in *Pugh*, the lack of meaningful work contributes to boredom and frustration. Those in turn contribute to violence and mental and physical degeneration. The failure of the Board to address this central problem reflects against its inability to convert talk into action.

Vocational education and work-release programs have been expanded. But here, too, substantial compliance has not been achieved because of management problems. Of 736 total spaces, more than 100 are vacant at any given time. In March, 1978, CETA funds were forfeited because the Board refused to parole or place on work-release trainees within a short period after graduation. As in 1976, eligibility requirements for most programs are quite strict. The breakdown of the classification system contributes to non-compliance in this area as well.

VIII. PHYSICAL FACILITIES

The Board has complied with paragraph (2) of this section to the extent that it has established work-release and other

community-based facilities. But as the discussion of Living Conditions clearly reflects, Draper, Fountain, Holman, and Kilby do not meet all of the minimum standards of the United States Public Health Service. Therefore the Board is not in substantial compliance with this section.

IX. STAFF

The Board admits that it has failed to employ sufficient personnel as set forth in the Court's order. When Staton prison was opened, it was staffed with personnel drawn from the other institutions in the system. The total custodial staff is inadequate even under the revised staffing standards proposed by by amicus National Prison Project on December 11, 1978.

X. MEDICAL CARE

Six years after *Newman*, the Board is still not in substantial compliance with the order entered in that case. The evidence reflects small gains, but glaring inadequacies have yet to be corrected. The most significant deficiency is in the quantity and quality of the medical staff. Of 105 authorized positions for medical staff, only 51 are filled. The system employs no full-time psychiatrist. Only the medical director is a licensed physician, and he is not full-time. Otherwise, the system is provided medical care by two unlicensed physicians with the title "physician's assistant," one physician with a limited license, and one with a suspended license. In addition, the Board has contracted with a group of residents to provide 20 hours of care per week at Fountain and Holman and with another physician to provide 5 hours of care per week for Draper, Staton, and Frank Lee. The medical director for Alabama's Prison System testified that the system needed at least four additional full-time physicians. Likewise, there is a need for four additional R.N.'s. At the present time, only Kilby is served by an R.N. This situation reflects almost no progress since 1972. Dental care, too, is inadequate with but one full-time and one part-time dentist for the entire prison system.

Quotas have been assigned to each institution. The backlog of inmates waiting to see a dentist has resulted in care limited to extractions, with little or no rehabilitative work done. As previously indicated, mental care is non-existent.

No effort has been made to bring the Medical and Diagnostic Center at Kilby into compliance with the minimum Medicare standards as required by the Court. A lack of professionalism characterizes the administration of the prison hospital. Patients with different strains of hepatitis have been placed in the same ward at great risk to life. There is no hospital dietician and no medical records librarian. A laboratory technician has been serving as hospital administrator. These conditions amply reflect that the medical director has failed to comply with the order of the Court that he develop a program of continual evaluation of all facilities and all personnel. The delivery of medical care in the Alabama Prison System is not characterized by poor management, but by no management.

A general lack of supervision is evident with respect to other provisions of the *Newman* order. The medication distribution system is lax and record-keeping is poor. Evacuation plans and written sanitation procedures, if in existence, are not referred to and utilized. The medical facilities have not been regularly inspected by the Fire Marshall and the Health Department. While the experts who testified disagreed about the need for specific items of medical equipment, there is no dispute that what equipment is ordered arrives only after long delays. Emergency transportation to free-world medical facilities is often unreliable because of the lack of security personnel. And the simple task of preparing job descriptions has not been completed.

The natural consequence of this understaffing and inadequate supervision is the continued evidence of medical treatment performed by inmates. One inmate testified that he gave injections and performed a hemorrhoidectomy; another testified that he filled teeth and performed dental surgery, for guards as well as for inmates.

The cumulative effect of these deficiencies and abuses is a threat to life and limb that violates the Eighth Amendment. The Board of Corrections' continued non-compliance with the minimum constitutional requirements set down by the Court conclusively establishes that there is no reasonable likelihood of compliance in the near future from that quarter.

* * * * * *

[1, 2] Time does not stand still, but the Board of Corrections and the Alabama Prison System have for six years. Their time has now run out. The Court can no longer brook non-compliance with the clear command of the Constitution, represented by the orders of the Court in this case. Plaintiffs are entitled to prompt and effective relief. Living conditions that constitute an imminent danger to health; inadequate medical care that poses a threat to life; and insufficient security that sanctions the law of the jungle—these facts describe a state of emergency demanding decisive action. It is clear that the Board of Corrections is incapable of effective leadership. Difficult as the Board's position was made by the lack of adequate funding, the Court finds that the Board could have ameliorated the conditions confronting it, but instead contributed to the gravity of the situation by its indifference and incompetence. The lack of any significant progress since the original hearings in this case strongly suggests that the appointment of monitors offers little, if any, hope of swift compliance. The extraordinary circumstances of this case dictate that the only alternative to non-compliance with the Court's orders is the appointment of a receiver for the Alabama prisons. The Court will thus grant that relief, first requested by plaintiffs in June, 1978. Further injunctions or contempt proceedings will not accomplish the task of compliance; such remedies promise only confrontation and delay. When the usual remedies are inadequate, a court is justified in resorting to a receivership, particularly when it acts in aid of an outstanding injunction. *Morgan v. McDonough*, 540 F.2d 527 (1st Cir. 1976); *see, Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1276, 28 L.Ed.2d

554 (1971); *Green v. County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968); *Griffin v. County School Board*, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964); *Turner v. Goolsby*, 255 F.Supp. 724 (S.D.Ga. 1966). There is, of course, a more extreme alternative to a receivership. In *Pugh*, the Court put defendants on notice that failure to comply with the minimum standards set forth in the order would necessitate the closing of several prison facilities. In light of that alternative, the more reasonable and the more promising approach is the appointment of Governor Fob James as receiver for the prison system.

[3] There can be no doubt that the paramount duty of the federal judiciary is to uphold the law. That is why, when a state fails to comply with the Constitution, the federal courts are compelled to enforce it. The habit that some states have fallen into of ignoring their responsibilities until they are faced with a federal court order is by now an all too well-known syndrome. The history of federal litigation in Alabama is replete with instances of state officials who could have chosen one of any number of courses to alleviate unconstitutional conditions of which they were fully aware, and who chose instead to do nothing. Consequently the federal courts time after time have been required to step into the vacuum left by the state's inaction. Regrettably, such orders result in the loss of some of the autonomy and flexibility the state might have exercised in the control of its public institutions had it chosen to accept the responsibility for their management before it was too late. That responsibility is one the Court will gladly relinquish to those who are elected to do it, if they are willing to undertake it. As this Court has publicly stated upon many occasions: "The Court looks forward to the day when responsible officials of the State of Alabama will assume their constitutional and legal obligations to run the state institutions in a manner that does not violate the Constitution and laws of the United States. Such a course of action would, of course, enable this Court to relinquish its substantial control of Alabama's governmental operations." By his petition to be ap-

pointed receiver, Governor James appears to have accepted that mantle of responsibility as far as the operation of the Alabama Prison System is concerned. Accordingly, an order will be entered appointing him receiver of the Alabama Prison System for the purpose of complying with the minimum requirements of the Constitution as embodied in this Court's previous orders.